

*No matter how diverse the policies that countries wish to adopt, there are a number of elements and mechanisms that need to be included in any telecoms law which aims to attract private investment while contemplating even a limited form of liberalisation.*

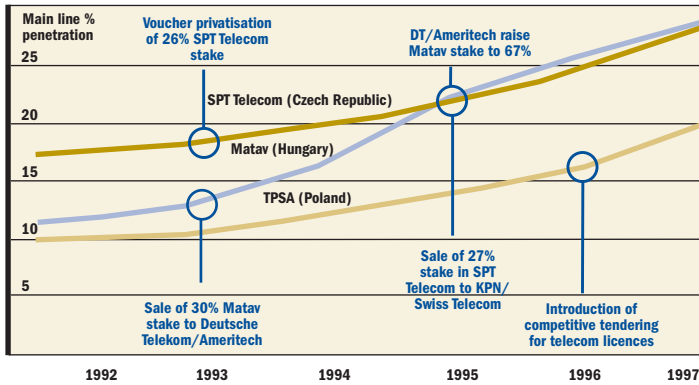
## The building blocks for telecoms reform

Legal rules, institutions and culture

A modern and affordable telecoms network attracts new business, improves efficiencies in existing businesses, generates substantial taxable income and creates economic growth for the entire country. The performance of the sector is improved hugely when there is effective competition between several privately owned players. In other words, the recipe for inexpensive and modern telecoms services appears to be liberalisation of the markets and privatisation of the main operators (see chart).

However, that is easier said than done. Privatisation and liberalisation are not always compatible with each other; an imminent liberalisation is likely to have a shrinking effect on the share price. Furthermore, and perhaps most importantly, it may deter serious investors from bidding or may undermine the government's chance to leverage the modernisation and the expansion of the network. On the other hand, a long-term exclusivity may perpetuate the inefficiencies of the past and, worst of all, delay the emergence of innovative new services. Monopolists are rarely innovative; international experience has also proved that new technologies and innovative modern telecoms services flourish only in liberalised environments.

## Privatisation stimulates rapid growth



## Estimated investment requirement to upgrade central and eastern European telecommunications

Estimated waiting list equals 24 million lines:		US\$ 24.0 billion
To bring fixed line penetration to:	30%	US\$ 39.4 billion
To bring fixed line penetration to: at assumed cost per line of US\$ 1000.	50%	US\$ 108.2 billion
To bring cellular penetration to: at assumed cost per subscriber of US\$ 500.	20%	US\$ 33.3 billion

Estimate based on PNE 1998 Year Book Data. Ignores costs of digitalising existing networks.

Governments are thus required to strike a balance between these conflicting objectives and decide which duration and which scope of exclusivity (if any) will give investors sufficient comfort without jeopardising the needs of the business community for modern, efficient and inexpensive telecommunications and the subsequent need to introduce competition.

This is a difficult task. Governments need to consider a great many parameters. They need to consider the condition of the existing network and the scale of the investment required in order to digitalise and expand it to international standards. They also have to take into account the overall economic performance of the country and the potential demand for telecoms services, as well as the ongoing international competition to attract financing (see table). Once this decision is made, they then have to design an adequate regulatory framework that will translate their decision into rules and laws. This is where the work of a legal reform provider begins.

Making policy decisions is not the role of the legal reform provider. Policy decisions can only be made by governments or parliaments. The role of a legal reform provider is to facilitate these decisions and give guidance. This can be done by sharing experiences from other countries, by providing an independent opinion on the advantages and disadvantages of the various options, by pointing out potential problems and shortcomings, and by helping the national authorities to put in place the regulatory framework that will turn these decisions into practice.

No matter how diverse the policies that countries wish to adopt, there are a number of elements and mechanisms that need to be included in any telecoms law which aims to attract private investment while contemplating even a limited form of liberalisation. The objective of this article is to identify these elements, describe their philosophy, discuss their effectiveness and their potential impact on the markets, and discuss how they can be used to achieve varying political priorities.

## Legal security, transparency and clarity

These requirements are not specific to telecommunications. Investors prefer to put their money in countries where the overall legal and political framework is clear, transparent, stable and predictable. This means, among other things, that if a country wishes to attract private investment to the telecoms sector, it needs to take a position on all major policy decisions and adopt a law that lays down in a clear and indisputable way the timetable for liberalisation.

The choice of words is not accidental; governments often believe that a framework law that empowers the relevant Minister or the Council of Ministers to adopt most major policy decisions is more suitable for the regulation of a fast-evolving sector such as telecommunications. This approach may be right as far as convenience is concerned. The problem is that it fails to provide investors with the legal certainty and security needed to make investment decisions. The policy decisions of the Minister or even the Council of Ministers can be unpredictable and, most importantly, easily modified. Conversely, this is not usually something that can be said about laws voted by parliaments. Normally, amending an existing law is a complex and time-consuming process, heavily publicised and therefore transparent and relatively predictable.

It is therefore not a surprise that investors prefer to place their money in countries where all the major policy issues have been resolved in the law. If translated into telecoms policy jargon, this would mean that a law is likely to reply to investors' needs if it:

**Sets forth the liberalisation timetable in a clear and indisputable manner.**

Investors need to know when competition will be permitted and the scope of the forthcoming

liberalisation. It is important to know whether entry barriers will be removed totally or if there will be a gradual introduction of competition, whether there will be cumbersome licensing requirements or a simple registration procedure for all new entrants, whether there will be tendering procedures for a limited number of licences or whether licences will be awarded to all candidates that satisfy the requirements.

#### Defines the margins of discretionary powers given to the licensing and/or regulatory authority

Investors need to be able to predict the decisions of the licensing and/or regulatory authority. This can only be achieved if the legal framework provides clear guidance on the criteria to be used for reaching a decision. Investors want to know in advance when an application for a licence is likely to be rejected and when an obligation to provide interconnection at lower prices may be imposed.

#### Mentions all possible conditions that can be attached to any type of licence or concession

It is important for investors to know up front whether they are likely to face an obligation to contribute to a universal service fund, whether some of their tariffs may be regulated, or whether they will be entitled to obtain wholesale prices when entering into an interconnection agreement with another operator.

#### Creates an independent regulatory authority vested with the power to intervene and resolve disputes that may occur between telecoms operators

An independent regulator with no affiliation to the incumbent operator is an important element of stability and objectivity in the market. It is reassuring to know that disputes or other issues between operators can be resolved objectively and transparently by someone who understands the telecoms

business and is familiar with its complexities.

#### Provides for legal remedies against the decisions of the licensing and/or regulatory authority

The possibility to challenge the decisions of the licensing and/or the regulatory authority represents a fundamental right of any citizen. It is essential for the democratic function of any country to ensure that the decisions of administrative authorities, including the telecoms regulatory authority, are subject to a judicial review and thereby a judicial control on how administrative powers are exercised.

#### Establishes the penalties and other legal implications that possible infringements may entail

The regulatory environment in a country is clearly enhanced when penalties and other legal implications are laid down in a law and cannot be changed arbitrarily by a mere ministerial decree. Investors need to be made aware, not only what is permitted but also the consequences of breaking the law.

#### Rules designed to tame the incumbent operator

The telecommunications industry has a very peculiar feature: the survival of any new entrant depends on its harmonious cooperation with its worst competitor, the incumbent operator. In most cases a new entrant will need to lease capacity and conclude interconnection agreements with the incumbent operator of each country it tries to penetrate. Forcing the incumbent operator to cooperate with those that threaten its cosy monopoly is obviously a difficult task. In most countries this problem is addressed by adopting a set of rules designed to force the incumbent operator to provide all new entrants with transparent, objective and non-discriminatory access to its network.<sup>2</sup>

The following identifies the main patterns of behaviour that an incumbent operator is

likely to adopt to protect its market position, and describe the rules that need to be included in the regulatory framework to encourage the gradual emergence of competition in a market.

#### A refusal to provide access to its network on fair and reasonable terms

An outright refusal is rather unusual since it would be immediately characterised as anti-competitive behaviour. Operators become increasingly sophisticated in the arguments they develop to protect their monopolies. Technical arguments and discriminatory pricing are some of the most common methods.

Technical arguments are normally dealt with by imposing on the operator the obligation to publish its interfaces and provide to the regulator all necessary information on the development of the network. Pricing issues, however, are more difficult. New entrants cannot penetrate the market successfully if their costs are significantly higher than those of their main competitor, the incumbent operator. Interestingly, a major part of these costs is the charges they need to pay to the incumbent for interconnection. The incumbent's incentive for maintaining the interconnection prices at the highest possible level could not be more obvious: not only would this increase its profits but it would also keep the competitors out of the market.

Regulators all over the world have spent much time and effort trying to ensure that interconnection charges are cost-oriented and do not exceed what the incumbent operator charges internally.<sup>3</sup> The approach that appears to be becoming universally accepted is to have the interconnection charges approved and monitored closely by the regulator, to develop a methodology on how cost accounting needs to be conducted, and to adopt guidelines on how the "correct" interconnection price should be determined.

## Open Network Provision (ONP) rules in the European Union

**The objectives of these rules are threefold: a) to facilitate the market entry of new operators, or alternatively to prevent distortions of competition; b) to ensure a certain level of service quality for consumers; and c) to lay down a system that will enable the financing of the universal service obligation.**

**In order to achieve these objectives, ONP rules make a distinction between various categories of operators and lay down different rights of obligations for the various operators depending on their category. The most important categories are:**

### **a) all organisations providing network or services to the public:**

this category includes any operator that provides services to the public notwithstanding the nature of the service. The main obligation imposed on these operators is to provide promptly to the national regulatory authority any financial, technical or business information that may be required. In return, they may ask the authority to intervene in difficulties with other operators.

### **b) all operators providing switched and unswitched bearer capabilities to users:**

in more simple language this category includes: i) all operators that control access to a network termination point identified by one or more unique numbers in the national numbering plan; and ii) all operators that provide leased lines or international circuits.

Apart from being subject to strict disclosure requirements, operators belonging to this category are also required to negotiate interconnection when requested by another operator and abide by the rules that the national regulatory authority may adopt with regard to these negotiations.

### **c) operators with significant market power that provide public voice telephony, leased lines or public mobile telephony:**

operators are considered having significant market power when they hold a share of 25% or more of the relevant market. In addition to the obligations imposed on the other two categories, these operators are required to:

- publish a list of their interconnection offerings, technical characteristics, supply and usage conditions, and the corresponding tariffs;
- provide access to their networks under the same conditions as those applying when providing access to their own subsidiaries or businesses;
- keep separate accounts for their various activities;
- ensure the availability of a certain minimum set of leased lines;
- follow the cost-accounting system adopted by the national regulatory authority;
- prove upon request that their charges for interconnection or leased lines are cost-oriented.

### **d) operators that provide public voice telephony and/or public mobile telephony:**

these operators are required to comply with specific rules and specifications designed to ensure certain levels of quality of service for all subscribers. Here again, operators are subject to different level of requirements depending on their size and market share. Operators with significant market power are subject to more onerous obligations than are new entrants.

Lastly, ONP rules invite Member States to assess whether the provision of universal service within their country represents a net cost and whether there is a need to establish mechanisms for sharing this net cost between various operators. In order to ensure that these mechanisms will not distort competition by giving unjustified subsidies to the operator that provides universal service, Member States are required to notify these mechanisms to the Commission for its approval.

<sup>1</sup>Under the EU regulatory framework, there are two ways to finance the cost of universal service: a) by asking operators to pay deficit access charges when they enter into interconnection agreements with the operator responsible for ensuring universal service; or b) by establishing a universal service fund where all telecoms operators contribute a part of their earnings. These contributions are then used for subsidising the less profitable segments of the market.

<sup>2</sup> In the EU this task is addressed by the Open Network Provision (ONP) rules. This is a set of rules laid down by a series of four directives. The first ONP Directive (ONP Framework 90/387/EC, OJ L 192/1, dated 24.7.90), was adopted in 1990 simultaneously with the First Liberalisation Directive (Services Directive 90/388/EC, OJ L192/10EC, dated 24.7.90). This first ONP Directive was followed by the ONP Leased Lines Directive 92/44 EC, OJ L165/27, dated 19.06.1992, and the ONP Voice Telephony Directive 95/65/EC, OJ L321/16, dated 30/12/1995. The fourth Directive was the Interconnection Directive, adopted in 1997 and considered generally as being the most important (EC97/33/EC OJ L 199/32, dated 26.07.1997). The first three Directives were designed to apply to a market structure where there was only one major operator per country enjoying some regulatory privileges. As a result, they had to be amended in order to reflect the liberalisation measures adopted by the EU in 1996. The box summarises the philosophy and the rules of the ONP directives.

<sup>3</sup>A level playing field can be obtained only if interconnection charges are similar to what the incumbent operator charges internally for a similar service.

## An attempt to proceed to unfair cross-subsidisation

Cross-subsidisation occurs when an operator uses monopoly profits or revenues from a market where it holds a dominant position in order to subsidise its activities in another market that it wants to penetrate. Cross-subsidisation becomes unfair and therefore prohibited only if the operator provides its activities below marginal cost, thereby undercutting all actual or potential competitors and ousting them from the market.

Unfair cross-subsidisation is a classic phenomenon in the telecoms industry; most incumbent operators are tempted to use some of the monopoly profits generated by public voice telephony in order to undercut their

competitors in the new markets where competition has been allowed. The usual regulator reply to this phenomenon is to impose on the incumbent or any other dominant operator an obligation to keep separate accounting for the various activities and to have the books audited regularly by independent auditors appointed by the regulator. Here again, detailed cost accounting rules need to be developed to limit the risks for unfair cross-subsidisation.

### Universal service obligation

The traditional argument against liberalisation has always been that universal service can be provided only by a monopolist. The term “universal service” refers to the obligation imposed on the national telecoms operator by social laws, or sometimes the constitution, to provide access to basic telecommunications to all citizens at a relatively low cost. If the national operator holds a monopoly, it can then use revenues generated by long-distance telephony, traditionally the more profitable market segment, in order to finance local voice telephony, usually the less profitable market segment.

Monopolists argue that, if their exclusive rights are removed, they will then be unable to honour their obligation to ensure basic telecoms service at an affordable cost. Regulators have thus to devise a method that will permit less privileged customers to have access to basic telecoms services without compromising liberalisation. The most frequently used solutions to this problem have been the establishment of a universal service fund or the introduction of access deficit charges. In the case of the fund, all telecoms operators pay some tax to the fund, which is subsequently used to subsidise the provision of telecoms services to uneconomical regions or customers. In the case of access deficit charges, the operator that has been given responsibility for the universal service obligation is entitled to increase its

interconnection charges to other operators by a certain amount designed to finance the cost of universal service.

There have been numerous theoretical discussions on the pros and cons of each approach. However, there has been very limited practical experience, since the universal service problem arises only when a country decides to liberalise public voice telephony. However, this liberalisation is only a recent phenomenon worldwide. As a result, it is very difficult to take a view on which approach would be more appropriate in any one case.<sup>4</sup>

However, regardless of whether or not liberalisation is imminent, national authorities are strongly advised to guide the telecoms operators towards a cost-oriented tariff policy whereby prices for the various services reflect the real cost of these services. As mentioned above, most operators around the globe have been subsidising local voice telephony with revenues generated in the most profitable segments of the market, such as international and long-distance services. As a result of this policy, incumbent operators risk finding themselves in a very uncomfortable position when some or all telecoms services are liberalised.

New entrants will obviously try to penetrate the most profitable segments of the market and undercut the inflated prices of the incumbent. By doing so, they will undermine seriously the incumbent operator's profitability as well as its financial ability to subsidise local voice telephony or any other unprofitable service. The incumbent will then probably try to compensate for its losses by requesting the intervention of the universal service mechanism.

However, not all unprofitable services deserve subsidies from the universal service mechanism; the objective of the mechanism is to permit the establishment of networks in the poorer and most remote regions of the country

and not to correct the imperfections of the incumbent's tariff policy. In other words, it is highly unlikely that the expansion and upgrading of the network within the country's capital or major cities needs to be subsidised.

Apart from its obvious distortive effects on the development of the markets, this unbalanced tariff policy has a particularly adverse effect on ensuring private financing. Private financiers are reluctant to invest in a business whose future is likely to be dependent on subsidies. On the other hand, rebalancing of tariffs cannot happen overnight; it is a socially and politically sensitive issue and can only happen gradually over an extended period. This is why it is highly recommended that the process is started as early as possible, even before any form of liberalisation has taken place.

### Creating an independent regulator

To run a public telecommunications network, one needs access to frequencies, to numbers, and to rights of ways. In the “good old days” of state-run monopolies the solution to this problem was very simple: the organisation that was running the national telecoms network was also empowered to manage at its entire discretion the national frequency spectrum and the numbering plan. In addition, the same organisation was given the necessary authority to obtain rights of ways whenever needed.

Once a country decides to introduce even some limited competition to the market, there is an urgent need to entrust all these functions to an independent regulator. It would be naive to believe that the national telecoms operator would happily share frequencies, numbers or other privileges with the new competitors struggling to penetrate its monopoly. The only solution to this obvious conflict of interest is to create a regulatory body that has no affiliation to the national telecoms operator and that will have responsibility for all telecoms regulatory matters.

### The profile of an independent regulator

Creating an independent regulator from scratch is not easy. As a result, the initial tendency of most countries has been to separate the Ministry from the operator and entrust the Ministry with the regulatory functions. However, it soon became clear that this was not a very “honest” approach since both the national operator and the regulatory department of the Ministry were usually headed by the same individual, the Minister of Telecommunications.<sup>5</sup> New entrants have consistently expressed their concerns whether this arrangement would provide the necessary safeguards of impartiality and objectivity.

In reply to these concerns, countries have gradually started creating independent bodies, separate from the Ministry of Telecommunications and from the operator, entrusted with all regulatory duties. However, policy decisions often remained the responsibility of the Ministry of Telecommunications, which occasionally was also responsible for the granting of licences.

This allocation of powers between the Ministry and the regulatory body often reflects a resistance to admit the unavoidable: during the decades since the invention of the telephone, governments and administrations have considered telecoms as a strategic sector, the survival of which was ensured through the continuous support and care of the government. It is therefore difficult to accept that the sector can indeed flourish if governmental intervention is totally eliminated. Some governments have thus decided to maintain the power to grant licences<sup>6</sup> and delegate to the independent regulatory authority the responsibility for enforcing the conditions attached to these licences and ensuring market surveillance.

Legislation from the European Union required Member States to separate the regulatory responsibilities from the operational functions as early as 1990.<sup>7</sup>

However, it is only recently that this requirement was clarified and developed. Under recently adopted EU legislation,<sup>8</sup> the independence of the national regulator can be guaranteed only if:

- national regulatory authorities are legally distinct from, and functionally independent of, all organisations providing telecoms networks, equipment or services; and
- Member States that retain ownership or a significant degree of control of organisations providing telecoms networks and/or services ensure effective structural separation of the regulatory function from activities associated with ownership or control.

The main message of this new legislation was to clarify that:

- the regulator and the incumbent operator may not share personnel and/or facilities; and
- the telecoms regulator or any of its employees may not perform any tasks associated with the representation of the shareholders or the management of the incumbent operator.

The need for these clarifications arose from the fear that, despite a nominal separation, there were still strong links between the two organisations corroborated by a continuous transfer of personnel, ambiguity in the definition of tasks, and sharing of various facilities (for example scientific laboratories and measurement instruments).

An additional element essential to ensure the independence of the regulatory authority is its financing. Interestingly, the nature of the business permits this authority to be self-financed if properly managed and organised. Frequency fees and licence fees can ensure a continuous flow of capital and so permit the agency to be totally self-sustained and potentially profitable. The only problem is to gain the political support needed to

<sup>4</sup> The EU Interconnection Directive (EC97/33/EC OJ L 199/32, dated 26.07.1997) gives Member States the option between a universal service fund and ‘supplementary charges added to the interconnection charges’. As a result, the various Member States have adopted different approaches.

<sup>5</sup> This used to be the case in both Germany and France, where the ultimate heads of respectively Deutsche Telekom and France Telecom were the Ministers for Telecommunications. The situation has now been changed in both countries. In Germany, the Ministry of Post and Telecommunications ceased to exist on 1 January 1998; all regulatory functions were taken over by the regulatory authority, an agency under the auspices of the Ministry of Economy. The regulatory authority is headed by a president and two vice-presidents who are appointed by the Federal Government upon the proposal of an Advisory Council.

In France, the independent Telecommunications Regulatory Authority (ART) has taken over from the Ministry of Posts and Telecommunications the majority of regulatory functions. ART is an independent administrative authority headed by five members, each appointed for six years. The Government appoints three of the members by decree, including their chairman. The President of the National Assembly and the President of the Senate appoint the other two.

<sup>6</sup> This is the approach taken by both France and the UK. In France, the Minister for Telecommunications has withheld the power to grant licences for public switched telecommunication networks. In the UK, the licensing power has remained with the Secretary of Trade and Industry, who is the Head of the DTI (Department of Trade and Industry).

<sup>7</sup> Article 7 of Commission Directive 90/388/EC published in OJ NoL 192/10, 24/7/90.

<sup>8</sup> Article 5a para 2 of Directive 90/387/EC as amended by Article 1 para 6 of Directive 97/51/EC published in OJ NoL 295/23, 29/10/97.

create such a genuinely independent, self-financed regulatory authority.

### The role of the regulator

As already mentioned, views do not always coincide on which tasks should be entrusted to the independent regulator. However, it is more or less universally accepted that the independent regulator should have responsibility for the management of the frequency spectrum,<sup>9</sup> the national numbering, the country’s standardisation policy, the overall market surveillance, and

the enforcement of the conditions attached to the various licences.<sup>10</sup>

This last task often proves to be the most onerous. The telecoms sector is currently experiencing a transition from monopoly to competition. Important instruments for ensuring the success of this transition are the conditions attached to the licences of the various operators and, in particular, the conditions attached to the licence of the incumbent operator. Supervising the behaviour of the incumbent and ensuring its compliance with all regulatory obligations imposed via the licence is a complex and difficult task. A significant amount of effort needs to be invested in monitoring the incumbent's financial books, ensuring that tariffs and interconnection charges are cost-oriented, safeguarding consumer interests,<sup>11</sup> taking measures to prevent unfair cross-subsidisation,<sup>12</sup> and intervening whenever new entrants encounter problems in obtaining access into the incumbent's network on fair and reasonable terms.

Dispute resolution between competitors is one of the most important functions of an independent regulator. Disputes between operators are a common phenomenon in the telecoms industry. To a certain extent, this phenomenon is created by the nature of the business itself, which obliges fierce competitors to negotiate cooperation or, as it is called in telecoms jargon, interconnection of their networks. Interconnection is a matter of life or death for telecoms operators. By providing interconnection, the incumbent operator accepts the loss of both market share and potential profits; by obtaining interconnection, the new entrant ensures its penetration into the incumbent's market and its economic survival. Unsurprisingly, the negotiations between those two are rarely easy; they often end in disputes which cannot be resolved without the intervention of an independent regulator who is also

vested with the power to impose a binding decision if negotiations fall through.<sup>13</sup>

Independent regulators are also asked to ensure a fair allocation of the universal service burden. Obviously the problem arises only in countries where liberalisation has already taken place.<sup>14</sup>

#### Telecoms regulator and competition authority

As explained above, the principal "mandate" of a telecoms regulator is to ensure the emergence of competition in the telecoms markets. The question that arises is why a telecoms-specific regulator is needed rather than entrusting this task to the national competition authority. The answer is that this may well happen in the not too distant future, although it is yet not possible.

Telecoms markets are very complex and, most importantly, highly resistant to competition. It is noteworthy that 15 years after liberalisation of the UK market the former monopolist still holds a 90 per cent market share. As a result, the telecoms regulator needs to take a much more proactive approach than any competition authority could ever do. Competition authorities intervene when one or more economic operator distorts competition in the markets in order to establish the infringement and impose penalties. Telecoms regulators are required to intervene in order to prevent possible distortions and, in the absence of any other solution, impose on the operators a specific pattern of behaviour. In other words, telecoms regulators are required to invent and impose cost-accounting methods, assess the level of the interconnection charges, monitor the accounts of the dominant operator, assist in the negotiations of an interconnection agreement, impose terms and conditions of interconnection if these negotiations fall through, and so on.

Does this mean that the competition authority has no role to play in the telecoms sector?

Definitely not. Despite the existence of a sector-specific regulator, there are still some tasks that can be performed only by a competition authority: for example, the assessment of mergers, acquisitions and joint ventures within the general competition rules, or investigations into cases of inappropriate collusion between telecoms operators. Furthermore, national competition authorities have long and precious experience in safeguarding competition; they know the philosophy behind it and the methodology that needs to be developed. This is a unique expertise most valuable to a newly born telecoms regulator. Consequently, it is highly advisable to devise a regulatory framework that ensures a close cooperation and consultation between the two authorities. An important element in this respect is to lay down clear and unambiguous rules on the tasks and competencies of each authority which will leave no room for power battles.

#### Dispute resolution

Telecoms is a sector prone to conflicts. There are conflicts between regulators and operators, between dominant operators and new entrants, and between operators and consumers. Most of these disputes are unavoidable. Therefore, there is a need to devise methods and procedures that will permit an efficient, transparent and prompt resolution of these disputes.

#### Disputes between regulators and operators

Regulators and operators may have a dispute for a number of reasons. Common cases include a refusal to grant a licence or the adoption of a decision imposing additional regulatory obligations on the operator concerned.

As a general rule, decisions of the regulatory authority should be subject to judicial review. This is hardly new: decisions of the regulatory authority are considered in most

countries as individual administrative acts, which constitutionally have to be subject to judicial control.

Judicial review provides safeguards of fairness, objectivity and transparency. The problem is that it involves long, time-consuming and often expensive procedures, which can be used by the parties to delay justice. Telecommunications operators, in particular the national incumbent operator, often have the money and the interest to prolong the proceedings interminably.

In order to prevent this, it is advisable to nominate a highly regarded court<sup>15</sup> as the body responsible for appeals against the decisions of the regulatory authority, and limit by law to the absolute minimum the cases in which the decisions of the regulatory authority can be suspended. This obviously implies that the proceedings before the regulatory authority need to be organised as if taken place before a court; there should be public hearings where the parties are given the opportunity to explain their positions and develop their arguments, parties should be entitled to legal representation and decisions should be made public and be adequately motivated.

#### Disputes between operators

As already mentioned, experience has proved that the most efficient way of dealing with this problem is by creating a strong and independent telecoms regulator, who will have the power and the knowledge to resolve the dispute by imposing a binding decision.

#### Disputes between consumers and operators

The relationship between a consumer and an operator is a contractual relationship similar to that of other client-service provider relationships. The operator is supposed to provide a service of a certain quality and the client is supposed to pay the corresponding fee. Like any other

contractual relationship, it may give rise to a dispute between the two contracting parties which can then be adjudicated. The problem is that the contracting parties in this case have huge difference of power; unsatisfied customers cannot just switch operators since in most cases there is a de facto or a legal monopoly. On the other hand, it is highly unlikely that a consumer whose telephone line has been interrupted for technical reasons for a long period will take legal action against the operator seeking material and moral damages.

This can lead to a situation where the incumbent operator is practically immune from any control on the quality of service provided to the consumers. Given the importance of telecommunications for both economic growth and social well being, this is unacceptable. The best way to avoid this is by setting up simple and inexpensive procedures whereby consumers can ask the regulatory authority to resolve the dispute in a timely and transparent manner.

### Conclusion

Telecommunications operators have long been considered as public utilities. There are still those who think that state security reasons create the need to keep tight control of the telecoms industry. Changing this mentality and evolving into a situation where telecoms is treated like any other profit-making business is likely to take time and effort.

We are only in the beginning and are trying to learn from each other's mistakes. However, there are not many examples available. The West embarked on the "liberalisation" project in earnest only a few years ago or, in the case of Europe, over a period best measured in months. It is too early to draw conclusions or assess which model or approach has been the most successful. There is only one thing we know

<sup>9</sup> However, in the United Kingdom, the day-to-day administration of frequencies is delegated by the Secretary of State, who functions as the licensing body, to the Radiocommunications Agency.

<sup>10</sup> This includes the responsibility for ensuring the appropriate administration of the universal service obligation as well as the satisfactory fulfilment of any other obligations arising from consumer protection considerations (such as quality of service or waiting time for a new line).

<sup>11</sup> The licences of the incumbent operators normally include network development and network expansion targets that these operators are required to achieve as well as detailed rules on the quality of service that has to be provided to the consumers. Examples of requirements that may be included in these licences include the provision of itemised billing, publication of tariffs, and achievement of a certain successful call rate.

<sup>12</sup> See page 25.

<sup>13</sup> The experience of Sweden is notable: the independent regulatory authority was initially given the role of a mediator without any power to impose terms and conditions on the disputants. However, after some painful experiences of unresolved disputes, it was decided to amend the law and empower the regulatory authority to adopt binding decisions and impose interconnection when negotiations reach a bottleneck.

<sup>14</sup> See page 26.

<sup>15</sup> By appointing one court, perhaps a specialist division of a higher court based in the capital city, responsible for hearing appeals against the decisions of the telecoms regulator, one ensures that this court will develop the expertise necessary for dealing with complex, technical telecoms cases in a relatively efficient manner.

for sure: the old example of the state-owned operator that holds the monopoly for all services cannot ensure the variety, quality and affordability of telecoms services that exist in countries where operators were privatised and liberalisation measures adopted early on. Beyond doubt, properly implemented privatisation improves the efficiency of the telecom company while competition boosts innovation and lowers prices. However, it is not yet demonstrated which regulatory approach will permit us to pass most smoothly from a state-owned monopolist environment to a privately controlled multi-operator environment. 