

# REGULATOR AND ENFORCEMENT: A CASE STUDY ON MALAYSIAN COMMUNICATION AND MULTIMEDIA COMMISSION (MCMC) COMPARATIVELY WITH FCC, IDA, OFCOM AND OTHER REGULATORS

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## ABSTRACT

*This paper investigates regulators and its enforcement powers, practices and procedures within Malaysian communication systems. It aims to specifically draw comparisons and evaluate said practices and procedures implemented by the Malaysian Communication and Multimedia Commission (MCMC) to that of those carried out by FCC, IDA, OFCOM and other relevant regulators.*

*Key words: regulator, telecommunication regulations, enforcement practices, enforcement procedures, MCMC, FCC, IDA, OFCOM.*

## ENFORCEMENT

One of the main attributes of effective regulation is the power to enforce compliance with sector policy, laws and regulatory decisions, including dispute resolution decisions. Today, very few regulators do not have enforcement power.<sup>1</sup> The differences in market and regulatory maturity, as well as legal and judicial practices, affect the enforcement practices and procedures of individual countries. However, it is generally agreed that an effective enforcement system is essential in any economy in order to give effect to those rules necessary for maintaining order in the sector, maintaining and facilitating stability, growth and development of the sector, deterring wrongdoing, protecting consumers, and maximizing social and corporate welfare (Domestic Enforcement of Telecommunication Laws, 2005:4). In summary, an effective enforcement system should be (Lima Declaration, 2005):

- i. Fast - enforcement decisions must be made quickly, decisively, and clearly to reduce uncertainty in the market and deter future violations;
- ii. Firm - penalties must be severe enough to deter violations;
- iii. Fair - the enforcement system should be perceived as fair and transparent, and decisions for enforcement action must be based on objective facts and evidence and made publicly available; and

iv. Flexible – the regulator should have other means aside from formal litigation or regulatory adjudication, such as alternative dispute resolution, to resolve complaints and disputes, as well as a wide variety of enforcement tools to ensure that the severity of the punishment matches the severity of the violation.

Additionally, in order for the regulator to enforce its rules effectively, an enforcement regime should include the following minimum attributes (Lima Declaration, 2005):

- i. Adequate resources for carrying out enforcement activities;
- ii. An efficient mechanism for dealing with complaints of non-compliance with rules and regulations;
- iii. A regulator with the authority to conduct investigations and enforce laws, rules, regulations, and decisions;
- iv. Transparent procedures for investigations, judgment criteria, sanctions and appeals, as well as options for dispute resolution; and
- v. An appeal mechanism to appeal a decision to a higher level, whether within the regulatory body or to the court system.

## **ENFORCEMENT PRACTICES AND PROCEDURES**

Numerous regulators have developed detailed procedures to facilitate and verify compliance of the telecommunications legal framework. Such procedures are generally based on the powers given to regulators under their respective telecommunications laws and related implementing regulations.<sup>2</sup> Other regulators, such as the Tanzania Communications Regulatory Authority have included provisions in the licence specifying the power of the regulator to investigate breaches of the terms of the licence or violation of national laws.<sup>3</sup> Clear and published enforcement procedures are needed to ensure transparency and accountability, for example, that sanctions are issued after adequate investigation, and that the accused party is provided with proper notice of the alleged violation and an opportunity for defense. Transparency also facilitates and encourages voluntary compliance with rules and regulations, minimizing the need for intervention by the regulator and reducing regulatory costs for the government and industry players (APEC Tele communications and Information Working Group, 2005:4-5).

## **ORGANIZATION AND RESOURCES**

To fully exercise their enforcement powers, regulators first must have the necessary organizational infrastructure and resources to support their activities. Enforcement activities require the regulator to have:

- i. A sufficient number of skilled staff responsible for monitoring compliance and conducting investigations;
- ii. Adequate technical capacity such as spectrum management and radio monitoring systems; and

iii. The necessary funds. Regulators often devote a significant amount of their financial resources to support enforcement activities.

For example, Anatel in Brazil, spends almost half of its financial and human resources on monitoring and enforcement activities (ITU, 2002:46). In the United States, approximately 20 per cent of the FCC's staff works on enforcement issues (Domestic Enforcement of Telecommunication Law, ITU, 2005:43). In Lithuania, in 2003, approximately 56 out of the 135 employees at the Communications Regulatory Authority (CRA) staff were involved in enforcement work (Lithuania Contribution, 2003:2). For new regulators, the resources required for enforcement purposes are sometimes underestimated and require modification. In Uganda, for example, only one person was initially responsible for enforcement. Between 2002 and 2004, the regulator installed a spectrum management system for monitoring spectrum usage and hired engineers and other trained professionals to supplement its staff in undertaking enforcement activities (Uganda Contribution, ITU, 2002).

Regulators, however, must not only have sufficient staff for enforcement, they also need staff with the proper authority and training to perform monitoring and enforcement duties, such as conducting inspections, searches and seizures, inquiries, and requesting the cooperation of police or judicial authorities as necessary. Many regulators have given broad powers to their officers allowing them to perform their enforcement functions appropriately. In Jordan, employees of the Telecommunications Regulatory Commission (TRC) are empowered under Articles 62 to 64 of the Telecommunications Act to act as "judicial police officers" when authorized to conduct searches and seizure of any unlicensed or illegal telecommunications equipment (Jordan Telecommunication Law, 1995:62-64). In Singapore, the Telecommunications Act grants the Infocomm Development Authority (IDA) and its officers the power to require information, have full and free access to all buildings and documents and to inspect, copy and take possession of such documents or equipment, to arrest and search without warrant in respect of certain offenses, and to compound offenses. Furthermore, any person who obstructs IDA officers in the execution of their duties is guilty of an offense (Singapore Telecommunication Law, 1999).

However, due to the intrusiveness of these investigatory powers, in some countries regulatory officials must sometimes obtain judicial warrants before exercising their search and seizure powers. In Jordan, TRC officers must obtain a warrant from the Public Prosecutor before entering private residence (Jordan Telecommunication Law, 1995). In Lithuania, the Communications Regulatory Authority inspectors must obtain a warrant from the Vilnius Regional Administrative Court before inspecting a vehicle, premises or territory (Contribution by Lithuania, ITU 2003:2). In Nigeria, officials and inspectors authorized by the NCC must obtain a warrant from a magistrate or judge before seizing, detaining or sealing off any building or premises when carrying out an investigation (Nigerian Communication Act, 2003 (2004)).

## ENFORCEMENT PROCEDURE

Enforcement procedures generally include the following stages: (i) initiating enforcement procedures and investigations; (ii) providing notice of the alleged violation; (iii) providing an opportunity to respond; (iv) issuing interim decisions or orders; (v) imposing sanctions; and (vi) providing opportunity for appeals.

### *Initiating the process*

There are several ways that a regulator can become aware of an alleged breach or violation of laws and regulations – regulator initiated investigations, consumer complaints, or operator complaints. A regulator-initiated investigation can be started by the regulator for various reasons. For example, routine inspection of licensees’ premises may reveal a violation, or a violation can be identified when objections are filed to license applications. Some licensees also may voluntarily report their violations (i.e., as part of industry self-regulation). In many countries, regulators have the authority to inspect facilities and equipment, and to request the submission of specific information or documentation to ensure compliance with legislation and license conditions. In the United States, for example, the FCC can request information directly from a licensee through a letter of inquiry or through a legal order, or court-issued subpoena.<sup>4</sup> Many regulators also have fixed and/or mobile spectrum monitoring systems to monitor and enforce compliance with spectrum usage and non-interference requirements. In Hong Kong (SAR), OFTA also proactively gathers market information through monitoring media reports, advertisements, and sales literatures (Hong Kong, OFTA, 2002).

A second mechanism for regulators to become aware of a possible violation is through the receipt of consumer complaints, usually submitted as “informal complaints” via telephone calls, letters or e-mails in order to allow for ease and simplicity in the filing of consumer complaints. In Brazil, consumers can submit complaints directly to Anatel, but also have the option of submitting complaints via Anatel’s toll-free call centers<sup>5</sup>. Although in many fully liberalized telecommunications markets the operators are given primary responsibility for addressing consumer complaints,<sup>6</sup> almost all regulators have some vehicle for consumer complaints, allowing consumers another avenue of redress for complaints that are not resolved directly with the operators. Furthermore, operators are less likely to ignore a consumer complaint knowing that the regulator also may pursue the matter on its own motion. The level of complaints received against a particular operator or service provider also provides the regulator with a good indication on whether to undertake enforcement action.

In addition to consumer complaints, operators and service providers often file complaints with the regulator seeking enforcement action. These complaints often take the form of “formal complaints” and are similar to a lawsuit in the information it requires and in the fact that complainants can also pursue individual relief. Typically, a formal complaint is submitted in writing, and requires, in addition to the name, contact details of the complaining party and allegations of the violation, that the complaining party cite the specific provisions of the law or regulation that is contravened, provide supporting evidence of the allegations made, and submit a signed statement that the facts alleged are true and whether any steps were taken to address the complaint with the party against whom enforcement is sought. See example of the submission requirements for the IDA in Box 1. Some regulators, such as the FCC in the United States, also may charge a filing fee for formal complaints (FCC: Complaint Filing Regulation, retrieved from: <http://esupport.fcc.gov/complaints.htm>).

### Box 1: Submission of a Written Request for Enforcement Action with the IDA

In Singapore, any party that requests the IDA to take enforcement action must submit a Request for Enforcement in writing, citing the specific provisions of the Code of Practice for Competition in the Provision of Telecommunication Services 2005 (Telecom Competition Code) that have been contravened, and attaching any relevant supporting documents to prove the allegations made. The Request for Enforcement must also include a signed statement that:

- i. The requesting party has used reasonable diligence in collecting the facts;
- ii. The facts alleged are true to the best of the requesting party's knowledge;
- iii. The requesting party believes in good faith that the facts alleged, if proven, would constitute a contravention of the provisions of the Telecom Competition Code;
- iv. Describes the manner in which the requesting party has been harmed, or is likely to be harmed by the alleged contravention; and
- v. The requesting party has made an effort in good faith to resolve the underlying dispute through direct negotiations with the licensee against whom enforcement action is being sought.

Source: Code of Practice for Competition in the Provision of Telecommunication Services 2005, Section 11.4.1.1

To encourage the timely filing of complaints, some regulators have included a statute of limitations within which a complaint can be brought requesting enforcement action. For example, in Singapore, the IDA will not initiate any enforcement action if more than two years have lapsed since the date of occurrence of the action that constitutes the alleged offense (Singapore Code of Practice, 2005). In France, the Telecommunications Act of 1996 mandates that “matters dating back more than three years may not be referred to the telecommunications regulatory authority if no action has been taken in view of an inquiry, verification or penalty (France Telecommunication Act, 1996).

#### *Due process consideration*

The enforcement procedure generally provides for a certain degree of due process before sanctions are issued. The regulator usually provides notice of the alleged violation after it receives a complaint or before it undertakes an investigation on its own motion and allows an adequate time period for a party to provide a response or defense. Generally, the notice of alleged violation notifies the parties that a complaint has been filed, specifies the provisions of legislation that have allegedly been breached, and provides details of the regulator's intended actions. Notices may also contain instructions on how the respondent may remedy the situation or provide instructions on how it may present its defense. In the event that an enforcement action is pursuant to a complaint, a copy of the complaint submitted to the regulator is usually sent to the respondent.

Typically, respondents are given an opportunity to file a response to the allegations in the complaint, and regulators consider the response before making a final determination on sanctions. For example, the Malaysian Communications and Multimedia Commission (MCMC) will not make a finding adverse to a complainant or respondent in an investigation unless the parties are given a minimum of 30 days to make submissions in their defense (MCMC Act, 1998). In Brazil, ANATEL gives the respondent 15 days to present its defense. In the United Kingdom, OFCOM will inform the complainant within 15 days whether it

intends to open an investigation into the complaint, and the respondent is allowed 10 days to respond to OFCOM's notice of investigation (OFCOM, 2004).

Timeliness in enforcement is critical to the promotion of competition and to maintain the credibility of the regulator. Some regulators, such as OFCOM in the United Kingdom, have additional authority under the telecommunications legislation to act urgently when necessary to resolve the complaint. Where OFCOM considers a violation as urgent, it may specify that any action taken by the alleged offender be taken sooner than would otherwise be the case. Generally, a case is regarded as urgent when the contravention has resulted in, or creates an immediate risk of: (i) serious threat to public safety, public health or national security; (ii) serious economic or operational problems for communications providers or providers of associated facilities; or (iii) serious economic or operational problems for users of electronic communications networks, electronic communications services or associated facilities (UK- Communication Act, 2003). Figure 1 illustrates a summary of enforcement procedures and timelines for some countries.

**Figure 1: Enforcement procedures and timelines**

Country	Notice Provided to Offender	Offender's Defense/ Response	Final Decision	Publication of Final Decision
Brazil	yes	15 days	30 days from conclusion of investigation	yes
Malaysia	yes	30 days minimum	not specified	yes, if Minister decides it is in the national interest
Singapore	yes	15 days	60 days	yes
United Kingdom	yes	10 days	4 months for disputes, 6-12 months for complaints	yes

Source: Telecommunications Management Group, Inc.

***Interim measures***

During the course of conducting investigations, some regulators including the FCC in the United States, the IDA in Singapore, and Ofcom in the United Kingdom also have authority to impose interim measures to protect the public interest and prevent any serious or immediate harm that may result from the alleged violation. For example, the IDA has authority under the Telecom Competition Code to issue an interim cease and desist order at any time during an enforcement proceeding if it concludes that: (i) there is prima facie evidence of a contravention; (ii) continuation of the contravention is likely to cause serious harm to other licensees, end users or the general public; (iii) the potential anticompetitive harm from allowing the licensee to continue its conduct outweighs the burden on the licensee; or (iv) issuance of the order is in the public interest.

## *Sanctions*

Regulators should have a variety of sanctioning tools to enforce compliance, and to ensure that the severity of the sanction matches the severity of the violation. When determining the appropriate sanction to impose, regulators should consider aggravating and mitigating factors such as the severity of the violation, the resulting harm to users and service provision, the benefits that the offender derived from the violation, prior violations, repetition of violations, early admission of the violation, cooperation or refusal to cooperate with the investigation, and the economic and financial situation of the offender.

Almost all regulators impose monetary sanctions, or fines. Most regulators have a specific schedule of fines, while other regulators in Peru, Poland, Portugal, and Turkey levy fines based on a percentage of the offending party's revenues (Telecommunication Development Bureau, 2005). The variety of sanctions available to a regulator may be constrained by the limits on the regulator's authority, in particular with regard to the ability to issue penal (criminal) sanctions. In some countries such as Burkina Faso (Burkina Faso, ITU, 2005), Egypt (Egypt, Telecommunication Regulation Law, 2003), Hong Kong (SAR) (Hong Kong, Telecommunication Ordinance, 2000), India (ITU World Communication Regulatory Database, 2005), Jordan (Jordan, Telecommunication Law, 1995), Malaysia (MCMC Act, 1998), and the United States (US Enforcement of Telecommunication Laws & Regulation, ITU, 2002), the telecommunications legislation allows for criminal sanctions, and the regulators have the authority to impose prison sentences or refer violations for criminal prosecution to the courts or the proper authorities. Other sanctions used for enforcement include issuance of warnings, remedial orders or specific directions to do or refrain from doing specific activities, public apologies, seizure of illegal equipment, and suspension or revocation of licenses.

## *Appeals*

To ensure that an enforcement system is fair, parties affected by a dispute resolution or enforcement decision should be able to seek an appeal of the initial decision to a higher level, even after the sanction has been issued. Appeals can be filed within the regulatory body to the next level in the hierarchy, or to outside bodies such as courts or an appropriate Ministry. In Singapore, parties appealing an IDA decision have 14 days to request the IDA to reconsider its decision or direction, or appeal to the Minister within 14 days of the IDA's decision on reconsideration (Singapore, 2005). Some regulators, such as the MCMC in Malaysia, also may require parties to first exhaust all other remedies available with the regulator before seeking judicial review (MCMC Act, 1998). An ITU survey on the right of appeal has identified that in a majority of countries (127 countries out of 165 surveyed), parties have the right to appeal regulatory decisions (ITU World Telecommunication Regulatory Database, 2005).

The appeal procedure, however, should not be so extensive as to diminish the effectiveness of the enforcement decision. To this effect, many countries prohibit the parties from raising new arguments during an appeal process. New Zealand, for example, limits appeals of the regulator's decisions to questions of law (New Zealand Telecommunication Act, 2001). Generally, appeals procedures do not impede the sanction entering into effect, although in many countries whether an enforcement or dispute decision is stayed or remains in force depends on the particular case.

## INDUSTRY SELF-REGULATION

As a complement to an enforcement regime, some regulators are encouraging industry self-regulation by requiring the use of alternative dispute resolution to resolve disputes, as discussed in above. Some regulators, particularly in more liberalized and competitive economies, are also engaging in more light-handed regulation and encouraging voluntary compliance with industry codes and standards to minimize the need for regulatory intervention (Telecommunication Development Bureau, 2005). For example, in Malaysia, the MCMC is expressly required under the Malaysian Communications and Multimedia Commission Act to promote and encourage industry self-regulation. The MCMC has acted accordingly by establishing industry self-regulatory bodies, such as the Consumer Forum, Content Forum and Technical Standards Forum, composed of industry and consumer representatives working together to produce voluntary industry codes (MCMC Act, 1998). Such voluntary compliance frameworks are not substitutes for regulatory enforcement, as the regulator still may be required to intervene and enforce compliance where parties fail to comply with voluntary rules and where the interests of consumers and competition in the sector are adversely affected (APEC Telecommunication and Information Working Group, 2005).

Another aspect of industry self-regulation is the encouragement of self-reporting by operators of possible infractions of telecommunications law and regulations. Self-reporting can be induced by lowering the sanctions for parties that disclose their own infractions. For example, in Hong Kong (SAR), OFTA considers early admission of the breach a mitigating factor in determining sanctions (OFTA, 2002). Similarly, in the United States and in Singapore, the FCC and the IDA encourage parties to voluntarily disclose any violations, and the regulators may consider such voluntary disclosure when determining the appropriate enforcement action (Singapore, Code of Practice, 2005).

## ENFORCEMENT OF DISPUTE RESOLUTION DECISIONS

The enforcement procedure described in the above section is focused on the regulator's authority to enforce its own "official" decisions and the national telecommunications laws. However, as described above, parties also rely on alternative "non-official" approaches to resolve disputes, such as arbitration and mediation, which may or may not involve the regulator's participation. All dispute resolution processes require some level of enforcement support from the official sector, whether from the regulator or from the courts (World Bank / ITU, 2005). Consensual processes such as mediation and negotiation rely upon courts to enforce settlement agreements.

Decisions resulting from regulatory adjudication rely upon the enforcement power of the regulator, and sometimes the courts as well, depending on how enforcement powers have been allocated, and which entity has the ultimate authority to overturn the regulator's decision. Many countries' telecommunications laws give regulators authority to enforce regulatory decisions resolving disputes. In addition, regulators may use their enforcement powers as an alternative to ordinary civil enforcement mechanisms, such as courts and police systems, to support less official dispute resolution initiatives, such as performing functions similar to a court in arbitration cases (World Bank / ITU, 2005). Generally, after parties have started court proceedings and reached a negotiated settlement agreement, the court will stamp the agreement, giving it the force of a court order. Regulators can perform a similar role by giving voluntary settlement agreements the force of a regulatory order, making the regulator's enforcement powers available to ensure the implementation and compliance with the agreement (World Bank / ITU, 2005).



## ENDNOTES

1. According to the survey on enforcement on licensees in the ITU World Telecommunication Regulatory Database 2005, the telecommunications regulators in Colombia and Suriname indicated that they do not have any enforcement power. The Colombian regulator, the Superintendencia de Servicios Públicos, enforces compliance by local and long-distance public telephony operators, and the Superintendencia de Industria y Comercio enforces compliance by mobile operators and Internet service providers. Although the Colombian regulator does not have enforcement power, it does have the authority to require information from licensees, and can impose fines for non-compliance with such order.
2. For example, the Uganda Communications Commission (UCC) (2005) has authority under the Uganda Communications Act, licence provisions and UCC regulations to receive, investigate and act on complaints, and to impose fines for violations. The UCC has the power to appoint inspectors to verify compliance with the Uganda Communications Act, and to criminally prosecute offenses pursuant to permission from the Uganda Director of Public Prosecutions. In the United States, the Communications Act of 1934 (amended by Telecom Act of 1996), as amended, gives the FCC broad authority to conduct investigations and take enforcement action. Domestic Enforcement of Telecommunications Laws: Guidelines for the International Community – Report on ITU-D Question 18/1, Section I, (2005) 22 September.
3. The Tanzania Communications Regulatory Authority (2002) may initiate investigations where the licensee fails to comply with installation and service requirements, fails to provide information to the TCRA or when there has been a partial or total interruption of services for a continuous period of time. See Four Steps to Enforcement, Contribution From Tanzania to ITU-D, Question 18/1, (2002) 19 September.
4. See Enforcement of Telecom Laws and Regulation in the United States, contribution from the United States to ITU-D Question 18/1, (2002) 30 August: 9-10. A letter of inquiry can be used to initiate an investigation into a matter or to determine whether to continue a proceeding beyond the preliminary stage of investigation or to gather more information during an ongoing investigation. The recipient of a letter of inquiry is given a specific time period in which to respond. Under 18 U.S.C. Section 1001, a person who makes a knowing and willful misrepresentation or omission in response to a letter of inquiry is subject to possible criminal penalties. Subpoenas require the recipient to release all information related to a particular matter under investigation. The FCC uses the information obtained through a subpoena as basis for further enforcement action or referral to the U.S. Department of Justice for criminal prosecution.
5. Undertaking monitoring and enforcement activities are costly to the regulator, and recently on 26 August 2005, Anatel had to close its call centers temporarily while waiting for additional funds to maintain operation of the centers. The call centers, which provided 24 hour service, were reopened on September 6, 2005 with diminished hours of operation, operating only between 8 a.m. and 8 p.m. from Monday to Saturday. Central de Atendimento da Anatel volta a funcionar, Anatel press release, 6 September 2005, retrieved from: <http://ww.anatel.gov.br>.
6. In Hong Kong (SAR), OFTA does not have statutory responsibility for consumer

protection since it relies wherever possible on market forces and competition to safeguard consumer interests in a fully liberalized and competitive market. However, OFTA will receive consumer complaints when consumers cannot resolve problems with operators or are not satisfied with the solutions proposed by operators, investigate into a complaint and take regulatory action if there is sufficient evidence to establish a prima facie case of breach of the provisions in the Telecommunications Ordinance. See Know More About how OFTA Handles your Complaint against a Telecommunications Operator, OFTA, retrieved from: [http://www.ofta.gov.hk/en/enq\\_help/complaints.html](http://www.ofta.gov.hk/en/enq_help/complaints.html).

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