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## Design of telecommunications regulatory authorities in fragile states: The case of Palestine

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**Omar Dhafer<sup>1</sup>**

**Design of telecommunications regulatory authorities in fragile states – the case of Palestine**

**Abstract**

This paper discusses regulatory design in unstable states. It focuses on the regulatory attributes of the regulatory authority. The paper analyzes three unstable states (Kosovo, Lebanon and Palestine) and offers a set of policy recommendations for additional and essential safeguards that shall produce and maintain an effective authority.

**JEL codes:** L96 or Z00

**Key words:** Telecommunications regulation, Regulatory design, Institutional Reform

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# 1. Introduction

Telecommunications liberalisation has changed rules of the game within the sector. It changed rules of the game at the institutional level as well. In order for Liberalisation to be effective, the old model of regulation that consisted of a regulated state monopoly had to change and the state had to relinquish any vested interests in the market. As a result, separation between regulation and operation was adopted and maintained by governments. This separation translated into a reform of the institutional setup of regulation. Independent regulatory authorities were introduced with certain privileges, which pushed governments further to the backseat<sup>2</sup>.

Institutional reforms were progressive in developed countries. Rules regarding design, powers, and privileges of the regulatory authorities, which were detailed in primary or/and secondary legislation were subject to periodic reviews and changes. With established institutional experience, developed countries were able to learn lessons and improve regulations. Their institutional foundations helped in correcting mistakes and preventing abuse faster than other countries.

This was not the case with regard to regulatory authorities in developing countries. Despite policy recommendations from the World Bank and other organizations on the need for detailed and specific rules in countries where institutional experience is limited or nonexistent, developing and fragile countries imported telecommunications laws from developed countries without paying attention to other specific instructions that were written in secondary laws, decrees, and regulations. Furthermore, such imported laws provided impractical solutions that are incompatible with fragile states' characteristics for some issues.

For example, the problem of regulatory capture has not been addressed adequately. First, high discretion was assigned to a newly established institution in fragile countries that lack tools that would be used to limit or reduce abuse of such discretion and; secondly, safeguards on regulatory independence that were implemented in the law overlooked the nature of the capture problem in fragile states, where the government enjoys close relationship with businesses and can team up with operators to manipulate regulatory decisions for their common interests.

Lack of specific laws and regulations and wrong analysis of issues related to fragile states has contributed to the ineffectiveness of regulatory authorities and development of the telecommunications market. The story of Palestine as a fragile state does not deviate from the general situation. Despite attempts of market liberalisation that followed a set of regulatory best practices, a highly concentrated market is still present. The institutional problems are hindering market liberalisation by either implementing incompatible solutions or lacking sound institutional design that would eliminate risks of regulatory capture, prevent deviation from regulatory goals, etc.

The ministry of Information Technology and Telecommunications imported the old Jordanian Telecommunications Law, which is a copy of the 1998 European Telecommunications framework. The institutional setup is similar to any common telecommunications regulatory authority in Europe, with a board of director and a set of powers, privileges, and safeguards that enables the regulatory authority to use regulatory tools and promote competition and other regulatory goals, while placing measures to prevent or reduce the risk of capture, corruption, and government's exploitation. In reality, though, the

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<sup>2</sup> This is the idle situation, of course. Past experiences showed that government still retained its influence and the degree of regulator's independence and government control depended on the respect for the rule of law and degree of corruption.

government is a stakeholder of the incumbent operator (fixed, mobile, and data) and the second mobile operator. It enjoys close relationship with most influential players. As a result, despite liberalisation policies were put in place since 2003, the market is still highly concentrated.

Recent literature focuses on the effectiveness of regulatory authorities in fragile states, but it hardly tackles the issue of regulatory design. Given the complicated and close relationship between governments and the private sector in such environment and the impact of such relationship on regulatory design, the design of the regulatory authority should be considered as an important prerequisite for an effective regulatory authority.

This paper follows a qualitative approach. First, it briefly presents literature on different regulatory design approaches that were discussed during the last two decades. Second, it analyzes regulatory design and the institutional setup that is adopted in the 2009 Palestinian Telecommunications Law and compares it with the regulatory design and institutional setup that is adopted in a telecommunications law of two unstable states (Kosovo, Lebanon) a stable and developed state of a similar or less size (Singapore). Finally it collects data from key stakeholders on the institutional and market problems and challenges that a regulatory authority faces in Palestine to reflect on a better design that eliminate problems and address challenges. Data is collected from key stakeholders through interviews.

Interviewers consist of:

- A representative of the Ministry of Telecommunications Information Technology
- A representative of the incumbent fixed line operator – Paltel
- A representative the incumbent mobile operators – Jawwal
- A representative the second mobile operator – Wataniya Palestine
- Representatives of Newly licensed providers of broadband Internet, VoIP, and Wi-Fi
- Representative of ISOC-Palestine's chapter
- A representative of Palestinian IT Association of Companies
- Consultants and experts that were involved in discussions regarding the 2009 Telecommunications Law

The reminder of the paper is organized as follows. Section two presents a theoretical framework; section 3 analyzes regulatory design in Kosovo, Lebanon, the Palestinian Authority, and Singapore; section 4 discusses additional safeguards essential for better regulatory design of the Palestinian telecommunications Regulatory Authority; finally section 5 provides a conclusion.

## **2. Theoretical Framework**

The design of a telecommunications regulatory authority aims at creating an effective agency that is able to efficiently utilize its powers and achieve regulatory goals set in the law, most significantly promoting competition in the market. The agency would have a mix of executive, legislative, and judiciary powers (Breville, 2004, page 6) that defines its structure and enables it to achieve its goals.

The design takes into consideration that the authority, which is modelled in a principal-agent world, is not a standalone agency. Different actors can and will take advantage of its powers to achieve their own goals. Thus, safeguards that prevent or limit abuses such as capture and political influence are installed in primary or secondary legislation.

Designing a regulatory agency concerns its attributes, which define its structure, powers, and functions and values, which define its autonomy and behaviour. It also concerns the agency's outer world in terms of relations with the government, the regulated industry, the consumers, and any other interested stakeholder. These relations are delineated through the agency's attributes and enforced through its values. Best international practices show that the establishing the agency's attributes and values should reinforce the concepts of better regulation.

Better regulation has been discussed by Baldwin (2010), Baldwin and Cave (1999) and Stern and Cubin (2005). The objective of better regulation is to address the shortcomings of institutional design of pre-liberalisation regulatory regimes<sup>3</sup> and to introduce a set of benchmarks that policy makers can use during reform initiatives to achieve higher quality of regulations. (Baldwin, 2010, page 259)

Protection of monopolies (capture) and failure to provide incentives for more efficient operations were the main institutional problems in the pre-liberalisation era. In parallel with economic reform, there was also an institutional reform, sometimes referred to as regulatory quality, regulatory governance criteria, effective regulation, better regulation, or good regulation.

In searching for an acceptable and good regulatory system, economic and ethical factors should be considered. Baldwin and Cave (1999, page 76) point out that wealth maximization, an economical measure of efficiency, alone is not adequate because it tends to overlook ethical issues such as wealth distribution and other rights.

A set of clear benchmarks is necessary to decide whether a current regulatory system is good or in need for a reform. This set of benchmarks criteria is almost unanimous among scholars with some minimal variations. In a survey of good regulatory governance criteria since 1997 Stern and Cubin (2005, page 7) observed several benchmarks with assignment of functions, autonomy, accountability and transparency being agreed upon by all authors. In particular, the following were observed:

- i. Regulatory discretion, organizational autonomy balanced by accountability, legislative mandate, funding, appointment and dismissal of regulator commissioners, and transparency were recognized by the World bank
- ii. Transparency, accountability, proportionality, consistency, and targeting were recognized by the UK Better Regulation Task Force (2005, page 51)
- iii. Clarity of roles and objectives, autonomy, participation, accountability, transparency, and predictability recognized by the Asian Development Bank (Stern & Holder, 1999, page 24)
- iv. Necessity, effectiveness, proportionality, transparency, accountability, and consistency recognized by the government of Ireland's White paper (2004, page 6)

Baldwin and Cave (1999, page 77) identified their set of criteria by looking at arguments that are generated and discussed in public. These arguments are summarized in the following questions:

- Is the action or regime supported by legislative authority?
- Is there an appropriate scheme of accountability?
- Are procedures fair, accessible, and open?
- Is the regulator acting with sufficient expertise?
- Is the action or regime efficient?

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<sup>3</sup> Capture of the regulator by the regulated industry is discussed by Kahn (1971, page 14/II), where he shows the negative effect of conservatism and protectionism in regulatory decisions during the pre-liberalization era.

Based on the above set of questions, they came up with criteria including legislative mandate, accountability, due process, expertise, and efficiency.

### ***2.1 Regulatory Attributes***

For the purpose of this paper issues regarding regulatory attributes are discussed, while regulatory values will be discussed in another paper. According to the above definition of better regulation benchmarks, regulatory attributes can be described as:

- The mandate that provides an agency with proper legitimacy
- The due process that defines procedures and processes
- The expertise that set a minimum level of expected staff competence

#### **A. Mandate**

Legislative mandate measures the legitimacy of the regulatory authority. In a democratic system, people elect the parliament and government officials, but they rarely elect regulatory authorities' directors. Usually, the Parliament creates and delegates powers to such authorities. Their directors are then appointed. The same law that creates these authorities defines the objectives they need to meet. Meeting those objectives would support their legitimacy.

The problem lies in defining sound and realistic objectives and delegating enough powers that enable regulatory authorities to reach those defined objectives. With regard to defining objectives, broadly defined objectives would subject them to interpretation, thus making the regulatory authority's job in highlighting achievements a hard one. In addition, objectives may either conflict, or be prioritized. Achieving one objective may involve a trade-off regarding other objectives. For example, objectives such as lower prices and environment friendly products could involve achieving more of one objective at the expense of the other one. (Baldwin & Cave, 1999, page 78)

The legislative mandate also sets the scope of action for regulatory authorities. It can determine if the authorities' jurisdiction is limited to telecommunications networks and operators providing basic telephony services, or cover other activities such as broadcasting networks or the Internet. For example, the EU 1998 regulatory framework scope covered telecommunications networks, equipment and services, while the EU 2002 regulatory framework scope covered all transmission networks and services. This scope is clearly spelled out in article 1 of the Framework Directive (2002/21/EC), which also spells out the scope of national regulatory authorities in article 3.

Broad legislative mandate would delegate more power and discretion to regulatory authorities, which might create a problem of legitimacy (especially if objectives defined were not achieved), while a specific and narrow mandate would restrict regulatory authorities from effectively regulate or respond to the rapid and dynamic changes of markets, which could create a gap between legislations and the market. To limit this gap, a good regulatory practice is to define a mandate in the primary legislation (Directive or Act) that cover the essential elements (basic rights and obligations, condition to implement them) and leave regulatory authorities to fulfil the ever changing technical details through promulgating and implementing secondary legislation (decision recommendation)<sup>4</sup>.

#### **B. Due Process**

The due process criterion is concerned about fairness, accessibility, and openness of procedures and

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<sup>4</sup> The White paper (2001) on European governance recommends such approach for a better and effective legal mandate.

processes of regulatory decisions. It is also concerned in equality, fairness, and consistency of treatment with respect to stakeholders and the level of participation in regulatory decision making. (Baldwin & Cave, 1999, page 79) Hence, it covers both procedural and substantive due process. Procedural due process is centred on fairness of procedures that should lead to a fair treatment of affected persons. (Calligan, 1996, page 52) With regard to public authorities (including regulatory authorities), procedural due process refers to “a set of a procedural doctrines, largely created by the courts, which express fundamental principles about the treatment of persons and the procedures needed to give effect to fair treatment.” (Calligan, 1996, page 74)

With regard to regulation, substantive due process requires governments or regulatory authorities to follow the rule of “mere rationality”, which ensures that authorities are pursuing legitimate, economic or social, objectives by means that are rationally related to these objectives. (Local Government Commission, 2006, page 4)

### **C. Expertise**

The tradition of expertise appointments has been strengthened in the legal systems of the US, and European countries since late nineteenth century. For example, American administrative system promote a technocratic administration, that is an administration where expertise and insulation from political influence would produce better decisions (Bratspies, 2009, page 575)

One criticism to institutional failure of the old regulatory paradigm was the fact that directors of regulatory authorities were not appointed based on experience, rather because of their political affiliations. The process of appointing key personnel is political and it has led to the appointment of inexperienced people who, at times, made bad decisions and judgments. This resulted in calls for reform in this area by appointing “better personnel” (Breyer, 1982, page 342)

Expertise in regulation is justified by the nature of the tasks regulatory authorities are assigned with. In fact, this was one of the arguments in support of creating regulatory authorities instead of keeping regulation under ministries (politicians that might not have sufficient expertise in the subject matter). Spectrum frequencies, price control, quality of service, numbering, etc are all issues that need experts to manage. Hence, “expertise” is used as a support of legitimacy and a form of creating regulatory trust between the authority and its stakeholders where instead of explaining or justifying decisions regulatory authorities use the phrase “trust to my expertise.” (Baldwin & Cave, 1999, page 80)

Unstable states face a problem in attracting enough expertise because of the limited source of labour and low public sector spending. Good public sector performance and service delivery is essential for the maintenance of the social contract between the government and the people (OECD, 2008, page 7) and for the creation of public sector jobs. This requires the public sector to have adequate financial resources in order to spend on essential services. The gap between fragile and stable states in public spending is significant. For example, average annual public sector spending per capita in OECD countries is above \$10,000, while it does not go above \$200 in fragile states. (Asian Development Bank, 2007, page 2) In addition to limited resources corruption, poor governance, and weak institutions are considered the reason behind low public expenditure. (Asian Development Bank, 2006, page 4)

With regard to limited source of labour, unstable states share the same problems of small states. There has been a vast amount of literature on the problem of limited labour base as one source of a limited institutional capacity in small states.

Liou and Ding (2004, page 756) states that one source of small States vulnerability is a limited institutional capacity. One of the reasons for a limited institutional capacity is the limited source of labour. The problem of “brain drain” is evident in small States, and it affects the public sector as much as it does for the private sector. (Cadman and Twomey, 2006, page 7).

Not only small states suffer from short of labour supply but also, the ability of public institutions to attract what is left of skilled labour is threatened by competition from the private sector for an already limited skilled labour. A rigid hiring policy would see the private sector attracting the bulk of available labour through competitive salaries and better work conditions. (Smith, 1997, page 3)

Limited institutional capacity leads to higher administration costs. In fact, economies of scale apply in this case, where the cost of serving the public decreases by the increase of staff size. Cadman and Twomey (2006, page 22) argues that “the cost of administration per head of population decreases as the size of economy increases”

## ***2.2 Political vs. Economic regulation***

Objectives of regulation are contradictory (de Streel, 2008, page 56). On the one hand, promoting competition requires enhancing static and dynamic efficiencies that involve *interalia* tariff rebalancing and elimination of subsidies. On the other hand, social goals such as universal service require that subsidies and/or low tariffs are kept. Such contradiction requires a careful consideration and balancing between economic and social objectives, especially in unstable states where social objectives are more important than economic objectives.

While the mandate helps in delineating the relationship between the government (represented by telecommunications ministry) and the regulatory authority, in practice the relationship can be more complex as the government might try to control the authority’s decisions, a phenomenon known as Favouritism or political capture.

Although politicians often delegate unpopular (i.e. economic issues such as tariff rebalancing) tasks to the regulatory authorities (Thatcher, 1999), they still seek to control the decision making process. Economic regulation is often delegated to the agency, while the ministry retains political regulation that concerns issues regarding universal service, labour force, ownership, etc.

However, the clash between both entities over economic and social/political issues is inevitable as the ministry would still retain its power in economic issues. Breville (2004, page 6) argues that in many countries, the separation of tasks between the regulatory authority and the ministry did not result in an explicit distinction between economic and political regulation. He shows that the French Ministry of Telecommunications has repeatedly interfered in economic matters that are the sole competency of the regulatory authority on political grounds.

This clash has a significant impact in unstable states due to the close ties between politicians and businesses. Political interference is likely to benefit the operators and service providers (most likely the incumbent operator) at the expense of consumers (Saleh, 2010). As the political-investment cycle continues (Levy and Spiller, 1994: 1996), the regulatory authority will find itself in a weak position to implement its mandate and achieve its economic and social goals. It will find it hard to establish an arms-length relationship with all stakeholders and to create a level-playing field where the interests of consumers, operators, and others are fairly evaluated.

## **3. Telecommunications Regulatory Authority design in fragile**



## **states**

This study examines the institutional setup of the regulatory authority in three fragile states, Kosovo, Lebanon, and Palestine (The Palestinian Authority). It also examines the institutional setup of Singapore, a stable state that is also small in terms of its area and population. Analysis of the mandate, due process and expertise is carried out.

### ***3.1 Background Information***

#### **A. Kosovo**

Kosovo has been under UN administration since 1999<sup>5</sup>. A telecommunications law (2003) that aims at liberalising the telecommunications sector and establishes a regulatory authority was officially adopted by the Assembly of Kosovo on 12 May 2003. In 2008 amendments to the telecommunications law were adopted by the Assembly of Kosovo.

With regard to institutional setup, the law separates regulation and operation of telecommunications and creates an independent regulatory authority.

#### **B. Lebanon**

Lebanon has been recovering from civil war and Israeli occupation/aggressions. Its sectarian problems negatively affect its governance due to high political interference. The telecommunications sector is governed by the Telecommunications Law (2002), which adopts market liberalisation and creates an independent regulatory authority.

#### **C. Palestinian Authority**

The Palestinian Authority (PA) was established in 1994 pursuant to the Declaration of Principles (The Oslo agreement) between the Palestinian Liberation Organization (PLO) and the government of Israel. In 1996, the President of the PA signed into effect the 1996 telecommunications law, which provides a regulatory framework. The Ministry of Telecommunication and Information Technology is designated as the telecommunications sector regulator. In 2010, the President of the PA signed into effect the 2010 Telecommunications law, which establishes an independent regulatory authority.

#### **D. Singapore**

Singapore's Act 41 (1999) establishes and incorporates the Info-communications Development Authority of Singapore. The act defines the authority's functions and powers.

### ***3.2 Institutional setup***

The institutional setup of the above four countries is almost identical. The telecommunications law of Kosovo, Lebanon, and the Palestinian Authority is inspired by the European Telecommunications Regulatory Framework. As part of the Enlargement project (Cullen-International, 2011, page 109), Kosovo is required to transpose the EU 2002 and EU 2009 regulatory frameworks. Lebanon and Palestinian Authority's telecommunications law are inspired by the EU regulatory framework for different reasons. One reason is the fact that their telecommunications sector is similar to European countries, where the telecommunications operator was a state-owned monopoly. Another reason is the reliance of the Middle East and North Africa region on European consultancy expertise in

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<sup>5</sup> UN Security Council Resolution 1244: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>

telecommunications-related issues.

### 3.2.1 Legislative Mandate

The following table shows the national regulatory authority’s legislative mandate incorporated within each country’s telecommunications law:

NRA	Legislative Mandate		
	Scope	Objectives/Functions	Structure
Kosovo	Telecommunications	<ol style="list-style-type: none"> <li>1. Implement policies set by the government and ministry</li> <li>2. Assign spectrum resources</li> <li>3. Promote telecom services (local and international)</li> <li>4. Enforcement of license terms and lawful use of spectrum resources</li> <li>5. Removal of Market entry barriers</li> </ol>	<ol style="list-style-type: none"> <li>a. Independent body</li> <li>b. 5-members board</li> <li>c. Chairperson designated by telecom minister</li> <li>d. Two 5-year terms</li> </ol>
Lebanon	Telecommunications	<ol style="list-style-type: none"> <li>1. Promote competition in the market</li> <li>2. Organize concessions, issue licenses</li> <li>3. Establish Interconnection rules and review interconnection contracts upon request</li> <li>Establish technical standards and rules and ensure compliance</li> <li>4. Monitor tariffs of service Providers with SMP</li> <li>Determine and collect tariff and fees</li> <li>5. Enforce present law</li> <li>6. Monitor anti-competitive behaviour and ensure market transparency</li> </ol>	<ol style="list-style-type: none"> <li>a. Legal personality, administrative and financial autonomy</li> <li>b. Is not subject to regulations governing public institutions but subject to audit court’s supervision</li> <li>c. Full time 5 members with a chairman appointed by council of ministers upon recommendation from ministry of telecommunications</li> <li>d. Detailed and clear membership termination mechanism</li> </ol>
Palestine	ICT	<ol style="list-style-type: none"> <li>1. liscencing</li> <li>2. Spectrum management</li> <li>3. USO</li> <li>4. Economic regulation               <ul style="list-style-type: none"> <li>-Anti-competitive practices</li> <li>-SMP designation (EU 1998)</li> <li>-Mergers and acquisitions –</li> </ul> </li> </ol>	<ol style="list-style-type: none"> <li>a. An independent legal personality with allocated budget from the public budget</li> <li>b. 7-members board. Chairman and six members appointed</li> </ol>

		<p>No detailed instructions  Competition guidelines  -Pricing telecom services –  No clear instructions on  price control mechanisms  5. To represent PA  internationally</p>	<p>by the President upon  recommendation of  the cabinet council  c. One 4-year terms  extended for 2 years</p>
Singapore	ICT	<p>1.Promote efficiency and  international competitiveness  of the ICT industry  2.Ensure that telecom services  are reasonably accessible to  all people (US)  3.Promote and maintain fair  and efficient market conduct  and effective competition  4. Promote effective  participation of all sectors of  ICT  5. To represent Singapore  internationally  6.Advice government on  policies and further  advancement of technology  and R&amp;D  7.Licensing and regulatory  functions in respect to  telecoms systems and  services, allocation and use of  satellite orbital slots, radio  frequency spectrum,  installation and use of under  seas cables, determination and  approval of prices, tariffs and  charges of provision of  telecom and other related  services  8. Promote investment in the  telecom industry</p>	<p>a. Chief Executive,  approved by the  minister. Not to be  removed from office  without the consent  of the minister (in  both cases after  consulting Public  Service Commission)  b. Employees are  deemed as public  servants (for the  purpose of the penal  code)  c. Appointments are  detailed in first  schedule (annex)</p>

As the table above suggests, there is no significant difference in regulatory objectives and functions across the four countries. Promoting competition remains the main regulatory objective, while licensing, combating anti-competitive behaviour, universal service and consumer protection remain as their primary regulatory functions.

As (Breville, 2004, page 6) notes there is a level of separation between economic and political regulation. Ministries have an overall privilege of setting the sector policy, while leaving regulatory authorities the task of establishing strategies to regulate the market. However, the government has the

final say on universal service policy, appointment of the board of directors, and funding of the regulatory authorities with no clear cut between a preferable intervention and unwanted intrusion.

### 3.2.2 Due process

Emphasis on transparent proceedings is not explicit. It depends on the subject. For example, licensing procedures are fairly developed and the process of awarding a spectrum license follows a set of international best practices for the most time. In other cases, lack of a predefined procedure is problematic.

For example, when Zain Group, the Kuwaiti-based mobile operator, made a bid to acquire Paltel Group, the Palestinian incumbent operator, there was no clear procedure of handling the acquisition case or investigating the impact of such merger on competition. Likewise, there are no clear procedures on consultations, tariff reviews, etc. In Lebanon, only processes for licensing, hiring and termination of staff and financial are remuneration defined.

### 3.2.3 Expertise

Lack of expertise is one of the main problems both in small and unstable states. The lack of specialized staff in technical, legal, and economic aspects of regulations is apparent in unstable states. This adds to the general problems of brain drain and poor public sector performance and the unmatched competition between the private and public sector over the remaining skilled people.

For example, Cullen-International (2011, page 110) notes that administrative capabilities of the Kosovo telecommunications ministry and regulatory authority are limited, while the regulatory authority is struggling in attracting and retaining qualified staff. The situation is the same in the Palestinian Authority, where the ministry does not even have an economist. The deputy minister admitted that they depend on consultants for that matter, but availability of consultants depends on available funds, which comes mostly from the World Bank and other donors. Thus consultancy projects are offered in an ad-hoc basis.

Due to lack of expertise, regulatory authorities fall behind in drafting regulations and making decisions on regulatory issues and disputes. Enforcement of regulatory decisions is also weak. The following table presents number of drafted regulations and regulatory decisions in Kosovo, Lebanon, and Palestine

<b>Country</b>	<b>Regulations</b>		<b>Decisions</b>
<b><i>Kosovo</i></b> Regulations: 2010-2012 Decisions: 2007-2012	Entry	7	103
	Economic	5	
	Social	1	
	Institutional	3	
<b><i>Lebanon</i></b> Regulations: 2009 Draft Regulations <sup>6</sup> : 2008-2010 Decisions	Entry	2 (6)	21 + 106 <sup>7</sup>
	Economic	1	
	Social	0 (1)	
	Institutional	0	

<sup>6</sup> The numbers between parentheses refer to number of draft regulations that are not adopted.

<sup>7</sup> There were 106 decisions to renew or extend licenses.

Palestine Regulations 2006-2012 Decisions 2008-2012	Entry	1	4
	Economic	2	
	Social	0	
	Institutional	0	

As shown in the table, the number of regulations and decisions is low. For example, Singapore<sup>8</sup>, which is a smaller state, but stable, have produced more regulations that cover entry, economic, social, and institutional setup. It has also made around 39 decisions in addition to another 10 pending. Furthermore, it has comprehensive codes of practice and guidelines, which clearly define issues related to competition, Next Generation Networks, accounting separation, contracts, etc.

#### **4. The design of the telecommunications regulatory authority**

Lack of expertise alone cannot explain the reason behind lack of authority's activities. Such a problem can be solved through external consultancy and regional cooperation (Cadman and Twomey, 2006, page 22). Although Kosovo is still behind other European Countries, in terms of qualified staff, it is producing more regulations and reaching more decisions thanks to the EU support and pressure. The continuing monitoring of the telecommunications market by the European Commission provides the necessary incentives for the regulator and ministry to implement their mandate. The European Commission acts as a master principal.

It is evident that political confederations have far greater effect on the authority's performance or lack of. First, there are the true political intentions of regulating the market that should be put to investigation. In other words, are the political elite willing to regulate the market in the first place or are they just easing the pressure of regulatory reform with a piece of legislation? This has become known as the problem of low political will (Eberhard, 2007) in fragile states.

In addition, if one accepts that there is a minimum degree of a political will towards regulatory reforms, issues of political interference, corruption, appointment of board members and executives, and competencies of the regulatory authority remain as a major source of concern for creating a successful and effective regulatory authority.

##### ***4.1 Macro issues 1: Political will and the need for a master principal***

Regulatory reforms become reality only if politicians are willing to adopt them. The change of telecommunications regulations in Europe 25 years ago was a result of a political shift from protection of local champions to opening up for free trade and integration of competitive Pan-European telecommunications market. The Green Paper (1987) triggered and initiated discussions that resulted in the 1998 European Regulatory Framework.

Furthermore, the European Commission is powered to charge member states with infringement of EU law (Article 228, TFEU), which acts as a powerful tool to ensure compliance of member states with regard to the implementation of the regulatory framework including the institutional setup<sup>9</sup>. The

<sup>8</sup> <http://www.ida.gov.sg/Policies%20and%20Regulation/20060416174257.aspx>

<sup>9</sup> Since 2003, there have been 99 infringement procedures against member states.

[http://ec.europa.eu/information\\_society/policy/ecommm/implementation\\_enforcement/infringement/releases/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecommm/implementation_enforcement/infringement/releases/index_en.htm)

European Commission has been heavily involved in telecommunications regulatory reform in the past as Thatcher (1999, page 8) notes how the European Commission has strongly supported such reforms against the protests of incumbent operators and labour unions, thus acting as a master principal of change.

The European Commission has also power over non member states defined as potential candidates to join the European Union such as Kosovo<sup>10</sup>. The Stabilisation and Association Process (SAP<sup>11</sup>) provides a Framework for better dialogue and coordination in order for potential candidate states to become members of the EU. Potential candidate states should meet the requirement of the European Union, including implementing European Law, in order to join the union. Implementing the 2003 Telecommunications Regulatory Framework is one of these requirements. The European Commission monitors implementation through several projects<sup>12</sup>.

With such powers, the European Commission acts as a principal of the principal (national government). This setup could help eliminating the problem of low political will in unstable states as the political elite would have to comply and implement policy changes. This is shown in the case of Kosovo, where despite being behind several European countries, it is still doing much better than other unstable states in other parts of the world as the political elite do have an interest in joining the European Union and motivated enough to implement policy changes. Increased number of regulations and decisions of the telecommunications regulatory authority of Kosovo can be one indication of Kosovo's commitment towards implementing the EU regulatory framework, thus enhancing its political will for regulatory reforms.

Lebanon and Palestine lack such relationship of a master principal. The Arab League and its Arab Council of Ministries do not have the same binding powers over Arab states. In addition, since most of the telecommunications operators are owned by the head of states or a member of the ruling family, the council of Ministries rarely reach an agreement over regulatory issues, as noted in Sutherland's (2010, page 6) International Mobile Roaming regulations case.

For Lebanon and Palestine to enhance their political will, a master principal that can push for law enforcements, either by reward or punishment is needed. This is more important in the case of Palestine as Lebanon can be compliant through the GATS' BTA agreement. However, since Palestine is not yet recognized as an independent state, the BTA is not binding.

One body that can play such role is the World Bank. It has both mechanisms of reward and punishment as their reports would encourage or discourage donor countries in investing in infrastructure projects in the Palestinian Authority. In the past, the World Bank (2008) was able to push forward telecommunications regulatory reforms that saw a second mobile operator and partial data liberalisation materialise. However, lately, the World Bank took a "watch and see" approach that left the Ministry of Information Technology and Telecommunications to regulate the market alone.

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<sup>10</sup> [http://ec.europa.eu/enlargement/potential-candidates/index\\_en.htm](http://ec.europa.eu/enlargement/potential-candidates/index_en.htm)

<sup>11</sup> [http://ec.europa.eu/enlargement/enlargement\\_process/accession\\_process/how\\_does\\_a\\_country\\_join\\_the\\_eu/sap/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/sap/index_en.htm)

<sup>12</sup> Cullen-International's monitoring reports on the progress of enlargement countries in adopting the EU regulatory framework is an example of such projects. <http://www.cullen-international.com/other-services/studies.htm?lng=en>

## **4.2 Macro Issue 2: Combating Corruption**

Lately, a series of corruption schemes have been uncovered in the telecommunications sector. Sutherland (2009) discusses number of corruption cases around the globe. Corruption can be explicit such as cash advances, subtle such as donations for the return of political favours, or a complicated such as creating a web of relations to facilitate nepotism and favourable treatment.

Corruption in unstable states is rather complicated. The presence of political investment cycles (Levy and Spiller, 1994) results in an undeclared coalition between the business and political elite. Such coalition facilitates nepotism to ensure maximum rewards.

According to Andriani (2011), AMAN's survey<sup>13</sup> shows that nepotism is the most common form of corruption within the Palestinian Authority. With regard to telecommunications, close ties between businesses and the government can be observed. The World Bank (2011) uncovered some of the corruptions cases in the sector, while the Palestinian Authority has been a direct shareholder in both, the incumbent operator (Paltel) and the second mobile operator (Wataniya).

The serious negative impact of corruption did not come from the preferable treatment of operators, but rather from the continuous attempts of delaying regulatory reforms. During the last seven years there were two rejected proposals of a new telecommunications law that establishes an independent regulatory authority. When reformists exploited a loophole<sup>14</sup> in the constitution and the PA President signed the 2009 Telecommunications law into effect, political interference ensured that selection of board members is delayed to present days.

Any serious attempt of regulatory reform was met by fierce opposition from political parties for different reasons, while the outgoing telecommunications ministry received death threats if he continued to pursue his reform agenda.

Lack of serious will to combat corruption has encouraged such activities. An official Anti-corruption body is not existent and corruption cases are rare. Design of safeguards that prevent corruption in the telecommunications sector is also nonexistent. The 2009 telecommunications sector does not target issues such proper code of conduct, definition of conflict of interest, transparent procedures, etc.

Such safeguards are essential to combat corruption and ensure that regulatory reforms are carried without interference. For example, the Singaporean Regulatory Authority has a complete guide on employees conduct. Furthermore, Article 12 of Singapore's Telecommunications law deem all members, officers, and employees of the regulatory authority as public servants, a safeguard that aims at holding the regulatory authority's staff subject to the Penal code.

The lack of participation from the wider public and exclusivity of decision making within the political elite increases chances of corruption and nepotism-influenced decisions. Consumers are best involved in consultations that are pre-designed<sup>15</sup>. They are badly informed as only alternative service providers participate in discussions. There is no real representation of consumers either individually or through consumer protection organizations. Furthermore, comments of participants are often neglected. Thus

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<sup>13</sup> <http://www.aman-palestine.org/english/>

<sup>14</sup> Because of the political split between Fatah and Hamas, the President announced emergency rule. Under emergency rule, the President can sign into effect temporary laws.

<sup>15</sup> The design of the bitstream access was made by Paltel. Despite several protests against the design and calls for modifications, the design was approved with no alteration.

trust in the regulatory process has been progressively decreasing.

#### ***4.3 Micro issue I: Appointment of board members***

Appointment of board members is always subject to arguments. In unstable states the political trauma dictates every decision, including appointment of agencies' heads. The decision is political more than professional. It usually constitutes first step of political interference by the government. Thus, the government tries to appoint a board that represents its political agenda.

Although the 2009 Telecommunications Law subscribe to a set of best practises in appointing board members, political appointments are still dominating the decision making process. This is practically a problem in small and unstable states known as the "group think" problem (Cadman and Twomey, 2006; OECD, 2003). Corruption through business-politicians links (Ateoglu and Ozdikmenl, 2008, page 2) adds to the problem of appointments. Also, lack of consumers' voice enhances coordination between political players. As a result, the selection process, which might seem normal and abiding the rules of appointments, would eventually favour a board that is politically aligned with the government.

Participation of citizens and consumer protection organizations in the board is essential to guarantee that different views are represented and prevent/limit political interference from the ministry. (Breville, 2004) PITA, a major stakeholder that represents ICT companies has proposed a "Council of Commissioners" during discussions and preparations for the 2009 telecommunications law. The Council of Commissioners consists of 3 professionals and manages the daily operations of the regulatory authority. Their suggestion was rejected.

#### ***4.4 Micro Issue II: Competencies and expertise***

The brain drain problem (Cadman and Twomey, 2006; Read, 2001; Kaempf and Singh, 1987) is a serious problem in small and unstable states. Most of talented expertise prefers to work in the private sector as the ministry of Information Technology and Telecommunications cannot match private sector's staff remuneration. As a result, the ministry does not have a single economist to review data submitted by Paltel.

The anti-competitive practice guide and the Interconnection guide that were sponsored by the World Bank and prepared by external consultancy are not being used. Economic regulation is crippled by the fact that other than benchmarking, the ministry cannot use any regulatory tool in the above guides to promote competition and prevent anti-competitive practices.

A possible solution for lack of expertise can be regional cooperation and assistant. (Armstrong and Read, 2000; the Joint Task Force. 2000; Cadman and Twomey, 2006) The Arab Regulators Network (AREGNET) can help in that regard. The proximity of Jordan and the ease of travel<sup>16</sup> make it the ideal country that can assist the Palestinian Authority in building its capacity. Like other Arab countries, Jordan's telecommunications regulatory authority is relatively a new institution. However, it has made good progress throughout the years and benefited<sup>17</sup> from implementing several projects that built its capacity<sup>17</sup>.

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<sup>16</sup> Since borders are still under the control of Israel, most Arab citizens are restricted from travelling to the Palestinian Territory. Only Jordanians and Egyptians can travel after securing proper authorisation.

<sup>17</sup> Among those is WIK's market reviews project.



The Palestinian Authority can plan for the long term and build a strategy for building its capacity. There are four major universities offering bachelor and/or degrees in economics and law. However, there is no specialized program in ICT law. Economists spend their academic time studying micro and macro economics without applying it to specific field. The Palestinian Authority can use the state-aid to help universities finance and develop specialized economic and legal programs. Such a plan will limit the dependency of the ministry on external consultancy, which is costly and unreliable.

## 5. Conclusion

The design of telecommunications regulatory authorities in unstable states is inspired by the institutional developments of post-liberalization era and modelled mostly around Europe's institutions. The legislative mandate clearly separate between regulation an operation, creates an independent regulatory authority and defines objectives of regulation such authority should pursue.

However, unstable states face many challenges that cripple such institution from effectively regulating the market and achieving the goals prescribed in the mandate. First, the capacity of regulatory authorities in unstable states is underdeveloped. Second, and more importantly, legislation lack essential safeguards that address unstable states' vulnerability.

With regard to the regulatory authority's capacity, it lacks in two elements. First, unstable states suffer from low labour base. The "brain drain" problem affect their ability to keep their skilled workers in the country and the fierce competition from the private sector over whatever left see public institutions employing under-qualified workers.

Second, primary legislation does not include all necessary processes that the regulatory authority should abide by while regulating the market. In the case of Kosovo, Lebanon, and the Palestinian Authority, hiring and termination of the board members and financial compensation (for Lebanon) were the only processes detailed in the primary legislation. The problem of low-skilled labour results in the inability of the regulatory authority to develop the rest of needed processes.

With regard to the lack of essential safeguards in primary legislation, the borrowing of regulatory best practices from Europe or other developed nations completely overlooks the intrinsic problems of unstable states, which have greater impact on the success of regulatory authorities. These problems are low political will, high levels of corruptions, political interference in the regulatory authority's decisions and the long-term problem of skilled workers.

Political will can be higher if there is a source of pressure on national governments to open up their telecommunications networks to competition. The EU is an example of the progress, however slow, of the telecommunications regulatory authority of Kosovo. The GATS' BTA agreement could work as a reference point to increase political will. In the Palestinian Authority's case the World Bank can play a positive role towards increasing the government's political will for regulatory reform.

Corruption increases the likelihood of political-investment cycles, which marginalises consumers and other stakeholders' and exclude them from the decision making process. A comprehensive solution to corruption is fundamental for an effective regulatory performance. Addressing the above macro issues will help solve the problem of political interference in regulatory authority's decisions.

For a long-term solution of the brain drain problem, national government, through state aid and the help of external consultants/universities, can establish specialized programs in economics and law to produce legal, economic, and technical experts that would work with the regulatory authority and decrease its dependency on expensive external consultants.

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