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ADR in a fluid ICT environment

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ADR in a fluid ICT environment

- Disputes inevitable?
 - “Changing Paradigms, Disruptive Technologies and Challenging Business Models”
 - “Disputed (IPR) Territory in Patent, Copyright and Trademark in the ICT sector”
- Public Policy Directions
 - “Network Investment, Competitive Services and the Ever-newer Media”
- Discussion

Disputes inevitable?

- Incumbents' defending market share -v- new market entrants' use of disruptive technology:
 - fixed -v- mobile: ongoing termination rate disputes
 - [2008] CAT 19, *T-Mobile, H3G, C&W v Ofcom*
 - GSM -v- 3G: auctions, licence fees and tax disputes
 - C-369/04 *Hutchison 3G & Ors v HMRC* (2007) ECJ (spectrum auction is to minimise interference, not to pursue an economic activity; therefore not taxable)
 - Dutch 3G auction (5 mobile phone companies), 2000
 - no possibility for new market entrant to gain licence?
 - potential judicial review-type challenges?


Disputes inevitable?

- Incumbents' defending market share -v- new market entrants' use of disruptive technology:
 - mobile -v- "nomadic"/WiMAX
 - IEEE 802.16-2009
 - UMTS -v- CDMA
 - COMP/39.247, EC investigation of TI and Qualcomm
 - Patent ambush: COMP/38.636, EC decision in *Rambus* (memory chips)
 - Open access to standards: COMP/39.416, Ship classification
 - switched (PSTN) -v- packet (IP, VoIP)
 - Opal Telecom/BT Ofcom draft determination 14 September 2009

Public Policy Directions

- ICT sector-specific dispute resolution
 - complex interrelation between technology, intellectual property, competition law and policy
 - too difficult for most mainstream courts
 - too expensive for consumers
 - no speedy resolution (risk of foreclosure etc)
 - alternative dispute resolution
- National regulatory authorities
 - role as dispute resolution bodies
 - oversight of industry bodies

Public Policy Directions

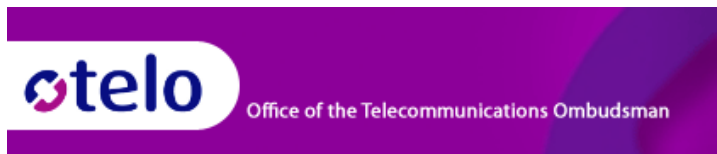
- National regulatory authorities as dispute resolution bodies
 - Article 20 Framework Directive 2002/21/EC:
 - binding decision by NRA in inter-operator disputes within 4 months
 - NRA may refuse jurisdiction “*where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute*”
-  Office of the
Telecommunications
Adjudicator
- In UK, for example, OTA2 oversees LLU and related disputes between Openreach (BT access division) and other operators

Public Policy Directions

- National regulatory authorities as dispute resolution bodies
 - Delegation to industry bodies/consumer bodies:



- UK: PhonepayPlus – PRS code and regulation, with adjudication tribunal
 - <http://www.phonepayplus.org.uk/output/Adjudications-process.aspx>



CISAS

- UK: OTELO and CISAS ADR schemes for consumers

Public Policy Directions

- “Network Investment, Competitive Services and the Ever-newer Media”
 - when NRAs act as dispute resolution body, usually act within statutory powers and duties:
 - e.g. Art 8 Framework Directive 2002/21/EC: policy and regulatory principles
 - go beyond immediate remit/terms of reference of an arbitrator, adjudicator or mediator etc.
 - what about other forms of ADR – equivalent terms to NRA powers/duties incorporated into terms of reference?



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