

ITU-T Technical Report

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DSTR-STUDY_DRCI

Dispute resolution between telecommunication operators and providers of OTTs



Technical Report ITU-T DSTR-STUDY_DRCI

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Summary

This Technical Report is meant to help ITU Member States understand the origin, nature and dynamics of the conflicts between traditional telecommunication service providers and over-the-top (OTT) providers, and have the information needed to design regulatory frameworks and set principles that will lead to the establishment of agile and transparent procedures for dispute resolution in the context of the mentioned relationship.

This task is not simple, bearing in mind the changing scenarios in the telecommunication/information and communication technology (ICT) market. Therefore, this document promotes flexible, transparent and collaborative frameworks and principles applicable to conflict resolution.

Keywords

Benefits, dispute resolution, ISPs, OTTs, policy, policy approaches, policy challenges, societal welfare, telecommunication operators.

Note

This is an informative ITU-T publication. Mandatory provisions, such as those found in ITU-T Recommendations, are outside the scope of this publication. This publication should only be referenced bibliographically in ITU-T Recommendations.

Change Log

This document contains Version 1 of the ITU-T Technical Report DSTR-STUDY_DRCI on "Dispute resolution between telecommunications operators and providers of OTTs" approved at the ITU-T Study Group 3 meeting held in Geneva, 9-18 July 2024.

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Dispute resolution between telecommunication operators and providers of OTTs

1 Scope

This Technical Report seeks to provide the international community, in both developed and developing countries, with the technical and policy background to dispute resolution between telecommunication operators and providers of over-the-top services (OTTs). Recommendations are not within the scope of this Technical Report.

Dispute resolution is discussed, excluding any discussion on changes in the digital environment or their impact on the traditional telecommunication value chain.

The economic impact of OTTs is also out of the scope of this Technical Report, although it is sometimes necessary to mention it.

There are cases in which the agents involved in dispute resolutions operate from different jurisdictions and their relationship is not necessarily supported by contracts or any regulatory or policy instruments. Such situations are not in the scope of this Technical Report.

2 References

- [ITU-T D.262] Recommendation ITU-T D.262 (2019), *Collaborative framework for OTTs*.
- [ITU-T D.1101] Recommendation ITU-T D.1101 (2020), *Enabling environment for voluntary commercial arrangements between telecommunication network operators and OTT providers*.

3 Definitions

3.1 Terms defined elsewhere

This Technical Report uses the following term defined elsewhere:

3.1.1 over-the-top (OTT) [ITU-T D.262]: An application accessed and delivered over the public Internet that may be a direct technical/functional substitute for traditional international telecommunication services.

NOTE – This definition of OTT is a matter of national sovereignty and may vary among Member States.

3.2 Terms defined in this Technical Report

None.

4 Abbreviations and acronyms

This Technical Report uses the following abbreviations and acronyms:

DSB	Dispute Settlement Body
FTA	Free-To-Air
IPTV	Internet Protocol Television
ICT	Information and Communication Technology
ISP	Internet Service Provider
MMS	Multimedia Messaging Service

NRA	National Regulatory Authority
OTT	Over-The-Top
PSP	Payment Service Provider
SMS	Short Message/Messaging Service
VAS	Value-Added Services
VoD	Video on Demand

5 Introduction

A cross-border and constantly changing telecommunication/information and communication technology (ICT) environment challenges not just the companies acting in the markets in this ecosystem, but also the relationships among them. These relationships can sometimes lead to disputes among the agents.

ITU-T Study Group 3 (SG3) has been committed to studying dispute resolution processes for a long time. Within the context of this work, SG3 participants agreed about the need to study and understand dispute resolution between telecommunication operators and providers of OTTs, and proposed a work item to deal with this task.

This Technical Report (which results from that decision) seeks to provide the technical and policy background to the international community, in both developed and developing countries, on dispute resolution between telecommunication operators and providers of OTTs.

The Technical Report seeks to be descriptive rather than normative. It aims to provide clear statements on the current state of play, and to identify suitable findings where appropriate. Nonetheless, in many cases, it refrains from expressing findings. Even in instances where there is little dispute over the relevant facts, there may be multiple conflicting interpretations and narratives based on those facts. In any event, recommendations are clearly beyond the scope of this Technical Report.

In order to take the study to its current level, it was necessary at times to resolve several interrelated scoping and definitional questions, at least on a tentative basis (but with the recognition that the tentative definitional conclusions for this study are without prejudice to any future regulatory definitions). The following are some of the issues that had to be addressed:

What is the nature of the dispute?

Given that there is a very wide range of disputes that could arise from the interactions between telecommunication operators and providers of OTTs, which disputes should be viewed for purposes of this study?

How do challenges relating to the competence/authority to handle dispute resolution between telecommunication operators and providers of OTTs affect the resolution of the dispute?

Specific aspects that are explored or provided include:

- the nature of the dispute resolution between telecommunication operators and providers of OTTs (clause 6);
- the competence to handle the dispute resolution (clause 8);
- principles for dispute resolution (clause 9); and
- mechanisms for dispute resolution (clause 10).

The economic impact of OTTs¹ is treated as being generally out of the scope of this Technical Report; however, it was necessary to mention it in passing at several points.

¹ Information about this topic can be accessed at [b-ITU TR-ECOTT].

Additionally, it is important to clarify that the agents themselves can always solve disputes through mechanisms that do not require intervention from a third body, through any mechanisms established in bilateral contracts. This condition does not exclude governing bodies from establishing dispute resolution procedures, especially in environments where the agents could be exposed to significantly unbalanced relationships.

6 The nature of dispute resolution between telecommunication operators and providers of OTTs

By their nature, conflicts among market agents can arise from any interaction between them, even when such interactions are indirect. Taking this into account, it is important to identify the value chain to be considered for the purpose of this Technical Report. The objective here is to discuss aspects relating to dispute resolutions between telecommunication operators and providers of OTTs, without addressing changes in the digital environment or how these impact the value chain.

Taking this into account, a high-level view of the communications value chain is proposed by the consultancy Analysys Mason in its report for Ofcom (UK) – Digital Communications Value Chains².

For the purposes of this Technical Report, the focus is on the competition between online and traditional services along with the related relationships³. As can be noted, there are several interactions identified in this value chain, some related to direct competition and others related to relationships to access suppliers or demanders.

Taking this into account, it is possible to identify, in a very hard and concise exercise, the following likely sources of disputes:

- Disputes as a result of direct competition.
 - Disputes arising from the interaction of the agents as competitors (interconnection), or
 - Disputes arising from agents' complaints about different regimes (legal, regulatory, etc.) to which each one is exposed.
- Disputes as a result of access to suppliers or demanders.
 - Disputes arising from agents' complaints about access (denial or unfair conditions) to suppliers or demanders. This could be emphasized when an agent acts at different levels of the value chain.

7 What is the nature of the relationship between telecommunication operators and providers of OTTs?

Based on the similarities and differences between the services and applications provided by telecommunication operators and providers of OTTs, it can be affirmed, on the one hand, that there is a relationship of mutual advantage between them, since OTTs benefit from access networks in order to reach their customers and users, which, in turn, due to the phenomenon of significant increase in data demand, allows telecommunication operators to increase the sale of network services and data transfer capacities to their respective customers, resulting in a significant increase in the overall telecommunication/ICT turnover, and thereby testifying to a cooperative relationship.

However, this unprecedented increase in the total business value of the digital economy, thanks to the entry into the digital ecosystem of OTTs, has not come without problems, since it has also created conflict between traditional telecommunication operators and OTTs, mainly because of the technical,

² See <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/digital-markets>.

³ Regulatory approaches may vary among Member States, which could change the environment as a result of different treatments with respect to the agents in this value chain. This does not, however, make it unfeasible to use that value chain for the purposes of this Technical Report.

economic and legal difficulties in allocating the costs and benefits resulting from the business expansion of both types of providers.

In addition, there is a group of applications that may be a direct technical/functional substitute for traditional international telecommunication services, which must be taken into consideration. This group includes traditional telecommunication services, especially television (FTA, broadcasting, cable, and IPTV), telephony, text and image transfer (SMS and MMS), that are sometimes offered by OTT providers in the public Internet to cover the same demand, but based on a different business model (in general, for free), possibly leading to a competitive relationship.

In summary, the relationship between telecommunication operators and providers of OTTs can be categorized as follows:

- Cooperative: as a link of mutual advantage with ample room for negotiation.
- Competitive: since there is a portion of their businesses where they are competitors.

Fewer disputes would be expected in cooperative relationships although, in some cases, disputes could arise because of the conditions in the contracts. Taking this into account, in Study Group 3, there has been extensive work done on this matter, of which the following can be highlighted:

- Recommendation [ITU-T D.262 \(2019/05\)](#): *Collaborative framework for OTTs*.
- Recommendation [ITU-T D.1101 \(2020/08\)](#): *Enabling environment for voluntary commercial arrangements between telecommunication network operators and OTT providers*.

In competitive relationships, disputes could be more likely, although the traditional telecommunication market is already filled with competitive relationships, and many times these are not a source for disputes between the market agents.

Therefore, these scenarios could, in the future, lead to a coopetition scheme, where the innovation in technology will drive the changing shape of the telecommunication/ICT market.

8 Competence to handle dispute resolution

As discussed in previous sections, it could be a challenge to try to pre-establish a clear separation of the competences among the diversity of the agencies, including different national approaches, that could be responsible for dealing with all the possible dispute resolutions that can arise from such complex environments.

Despite this challenge, the existence of a clear definition of competences would be helpful to the agents in their efforts to identify the appropriate body to propose a specific dispute resolution process. A clear identification of the body responsible for dealing with a dispute resolution, that has a well-established dispute resolution process, would work as an incentive for the agents to reach an agreement, maybe even prior to dispute resolution being proposed. This aspect is also highlighted by the Body of European Regulators for Electronic Communications (BEREC) in its "Opinion on the Revision of the Broadband Cost Reduction Directive"⁴:

The mere effect that there is a mandatory dispute settlement process can apparently solve problems, even without a formal decision of DSB. MSs experienced – even if their DSB decided only a few cases so far –, that arguing parties often reached a bilateral agreement in the mandatory conciliation process (beforehand the dispute settlement process of the DSB).⁵

⁴ BEREC (2012), *BEREC Opinion on the Revision of the Broadband Cost Reduction Directive*. <https://www.berec.europa.eu/en/document-categories/berec/opinions/berec-opinion-on-the-revision-of-the-broadband-cost-reduction-directive>

⁵ DSB: dispute settlement body. MS: Member States (refers to the Members States of the European Community).

Therefore, it is important to discuss the competences of traditional bodies that deal with dispute resolutions, and other possible bodies.

8.1 National regulatory authorities (NRAs)

Prior the elaboration of this Technical Report, Study Group 3 consulted Membership about the competence of the NRAs. During this consultation, some Members stated that telecom regulators seem to have competence relating to dispute resolution between licensed operators and the consumer.

Additionally, many Members expressed the view that NRAs have the competence/authority to handle dispute resolution between telecommunication operators and providers of OTTs, even that the venue of the dispute resolution usually defined by the nature of the dispute and that could be an overlap of competences among some agencies to deal with dispute resolution involving OTTs.

It is important to note that, in the recent years, there has been a movement around the globe attempting to understand and improve the institutional environment that could be competent to create contestable and fair markets in the digital sector. This movement can cause changes in the competences of the NRAs, especially considering that NRAs are more related to ex-ante regulations.

8.2 Competition authorities

In general terms, competition authorities have the competence to deal with any dispute resolution involving the potential harm to the competition environment. Taking this into account, it is to be expected that some disputes between telecommunication operators and providers of OTTs can be resolved by competition authorities.

However, when the dispute includes allegations of regulations being breached by one party, then it will be optimal that there is close collaboration between competition authorities and NRAs, to get sufficient information about the complaint and, from there, to start to investigate under the umbrella of competition law and regulations.

8.3 Data protection authorities

In cases where disputes involve elements pertaining to the field of data protection, specifically related to consumer data, the data protection authorities are the most suitable bodies to manage this aspect of the dispute, bearing in mind that privacy issues are vital for both protecting user rights and for the sustainable evolution of the digital economy.

Therefore, in some jurisdictions, the data protection authorities could be involved in the dispute resolution between telecommunication operators and providers of OTTs, if the dispute encompasses aspects relating to data protection.

8.4 The courts

Although the competencies of judicial branches vary, including recognizing different national legal systems, in many jurisdictions, the judicial branch can analyse and revise administrative acts.

The dispute resolution mechanisms, which can rely on the competence of any of the above-mentioned authorities, should be without prejudice to the right of the telecommunication operators or OTT operators or users, to seek redress before judicial authorities in accordance with national law.

Therefore, the courts should always be considered as having the competence to deal with any dispute resolution, although mechanisms that use specific authorities should be encouraged.

The courts can also analyse and revise administrative acts relating to the dispute, including previous decisions from other bodies.

8.5 Other bodies

In certain cases of dispute resolution between telecommunication operators and providers of OTTs that refer to issues regarding guarantees of consumer rights, consumer protection authorities could also participate in order to provide relevant elements from their legal perspectives.

9 Principles for dispute resolution between telecommunication operators and providers of OTTs

The healthy development of the telecommunication/ICT environment has to be preceded by a convenient agreement between telecommunication operators and providers of OTTs, which enables the maximum ICT capabilities to the different users: enterprises, government, entrepreneurs, researchers, individuals, and society in general.

A good agreement between these stakeholders has to be built on a solid basis with a strategic vision that includes:

- Cooperation as a feasible way to get synergies; and
- Focusing on the long term to realize all potential benefits.

In general, it would not be appropriate to apply the regulatory principles applied to network and telecommunication operators, in terms of quality of service, to OTT providers, considering the different nature of the OTT applications.

10 Dispute resolution mechanisms

When dealing with specific cases of conflict between telecommunication operators and providers of OTTs, the authority's action could provide alternative scenarios to be considered by the parties involved.

Optimally, these alternatives will be set up in close collaboration with the stakeholders, in order to provide the background and all relevant information and get results that are attractive in terms of actual and potential benefits for them.

Given that parties could belong to different but connected markets, a multisector approach could be appropriate for handling the dispute, aiming to achieve a sustainable and beneficial relationship between the telecommunication operators and providers of OTTs.

For those situations where more details and analysis are needed to get an agreement, the authority could lead a mediation and/or negotiation process, to be developed by rounds, to discuss the main aspects of the problem, especially for identifying and solving the bottlenecks.

To be effective, Member States are invited to study, design, develop and establish official procedures that cover these processes, which, ideally, have to be as concise as possible, and oriented to both balanced and acceptable results in terms of a win-win agreement.

ITU has, in the [ITU DataHub](https://datahub.itu.int/data/?i=100098), some information collected from the administrations on dispute resolution mechanisms, available as: <https://datahub.itu.int/data/?i=100098>.

10.1 Case studies

Policy approaches taken or proposed vary widely, and in several ways, from one country to the next, even among countries in the same region. This chapter looks at approaches taken in two countries, considering different institutional environments.

It is too early to say what represents best practice as regards regulatory and policy approaches for dispute resolution between telecommunications operators and providers of OTTs.

10.1.1 Cameroon

In Cameroon, a distinction is made between local content and application providers and international content and application providers, generally known as OTTs. Local content providers are subject to national or subregional regulation and legislation. In the financial sector, for example, payment service providers (PSPs) use mobile telephone or Internet networks to provide their services to end users, who tend to be mobile telephone subscribers. Given the volume of traffic that their activities generate, PSPs are considered large local content providers. Since 2018, PSP activities have been regulated in the Central African Economic and Monetary Community (CEMAC) by a community-wide regulation. The local content provider shall always operate in partnership with an Internet service provider (ISP) duly licensed to operate in the electronic communication sector (via concession, licence or declaration). Revenue sharing in this value chain is performed either in accordance with the requirements of the interconnection and access catalogues or by agreement among the value chain actors. Dispute resolution procedures are prescribed by the regulations in force and included in the contracts between the different actors.

Conversely, the relationship between ISPs and international content providers is not governed by national or community-wide texts. Certain local operators have been able to negotiate agreements with OTT content providers, for access to cached files, for example, but these tend to be standard form contracts, drawn up by the OTT, where the ISP has little choice but to accept. Such contracts include procedures for the settlement of disputes between the parties.

10.1.2 Brazil

The law⁶ that created Brazil's telecommunications authority (National Telecommunications Agency – Anatel) also granted Anatel the authority to administratively handle dispute resolutions between telecommunication service providers. The same law gave Anatel the authority to regulate the conditions and relationships between service providers and users of the network, which includes providers of value-added services (VAS).

Given these powers, Anatel issued regulations relating to the process of dispute resolution between telecommunications service providers, as well as between telecommunications service providers and the providers of VAS.

In principle, the dispute resolution must be solved by the parties, through negotiation. However, if there is no agreement, Anatel must establish conditions so there can be certainty on the points on which the parties do not agree.

Therefore, in the event of dispute resolutions between telecom providers or involving VAS providers, Anatel must act to bring a solution that pacifies the situation. In other words, the conflict cannot be an obstacle to using the network; if there is a desire to use the network, access must be guaranteed, as well as the conditions on how this access should be provided. Recalling that in the Brazilian legal system, as in many other jurisdictions, administrative acts can always be analysed by the judiciary

Complaints about the unauthorized provision of telecommunication services

In 2018, a dispute resolution involving a pay TV operator and video on demand (VoD) companies was presented to Anatel. The pay TV operator argued that VoD would be providing a telecommunication service (pay TV) without authorization.

The central legal issue in this specific case consisted of defining whether VoD services should fall within Brazil's legal definition of telecommunication service or VAS. When analysing the case, Anatel considered the differences in relation to the way in which content is made available by pay TV operator companies and VoD companies.

⁶ Lei nº 9.472, de 16 de julho de 1997 (*portuguese only*).

https://www.planalto.gov.br/ccivil_03/leis/19472.htm

Anatel decided that VoD companies have no control or responsibility over the transmission network used by the end consumer to obtain access to audiovisual content. Therefore, such service is characterized as a VAS under national law.

11 Concluding remarks

This Technical Report concludes that the telecommunication operators and the providers of OTTs, who are both involved in the telecommunication/ICT environment and eventually in the dispute resolutions, should be prepared to identify, in an assorted institutional environment, what is the best approach to solving each case, including private dispute resolution processes.

It has been observed that these disputes originate mainly from: (1) the competition from substitute services and applications, but each one provided on different business models; and (2) the difficulties in allocating efficiently and equitably the benefits and costs that result from their relationship.

To manage this situation, this document has suggested some measures and regulatory positions to be considered by the regulator and other relevant government authorities, which tend to resolve disputes using a non-intrusive approach, with emphasis on legal assistance, in the participation in, and the search for, spaces for dialogue and discussions to achieve positive and satisfactory outcomes for the parties involved.

It was noted that Member States are encouraged to establish the competences of different bodies in their jurisdictions, making clear, to those who need to solve some sort of dispute, the mechanisms and procedures to be fulfilled.

Additionally, there is the recognition that the institutional environment, along with the competences of each body, is a matter of national sovereignty and may vary among Member States.

Bibliography

[b-ITU TR-ECOTT] Economic Impact of OTTs – Technical Report.
