



January 07, 2019

To
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Advisor (QoS),
Telecom Regulatory Authority of India (TRAI),
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Subject: Access Now comments to TRAI's Consultation Paper on Regulatory Framework for Over-The-Top (OTT) communication Services

Dear Sir,

We write to you in connection with the consultation paper on regulatory framework for Over-The-Top (OTT) communication services, which the Telecom Regulatory Authority of India (TRAI) published on November 12, 2018 seeking public comments. This letter contains Access Now's initial inputs in response to the consultation paper.

Access Now is an international non-profit organisation which works to defend and extend the digital rights of users at risk globally. Through presence in 10 countries around the world, Access Now provides thought leadership and policy recommendations to the public and private sectors to ensure the internet's continued openness and the protection of fundamental rights. Access Now also engages with its global community of nearly half a million users from over 185 countries, in addition to operating a 24/7 digital security helpline that provides real-time, direct technical assistance to users around the world. We coordinate as part of CiviCERT (Computer Incident Response Center for Civil Society) a Trusted Introducer accredited CERT. We also have special consultative status at the United Nations.¹

Summary of our comments:

We thank the TRAI for this opportunity to provide comments to this open consultation. Our inputs here are derived from our previously published longer policy paper entitled "*Proposals*

¹ Access Now, *About us*, <https://www.accessnow.org/about-us/>.

for regulating internet apps and services: *Understanding the digital rights impact of the ‘Over-the-Top; debate’*² (Annexure A), in which we propose two high level recommendations in the context of the “over-the-top” services regulatory discussion:

1. Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services.
2. Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights.

We further submit that the term “OTT” must be used cautiously, since it can serve to understate the impact that some regulatory proposals can have on the internet applications or services that we use every day. **Overbroad, telecom-style regulation and licensing can harm the open internet and the principles that sustain our enjoyment of digital rights, impacting in particular - permissionless innovation, Net Neutrality (including the end-to-end principle), and low barriers of entry.**

Policymakers and other stakeholders should act to counter the trend towards the commoditization of the internet, where applications are licensed separately and offered in “bundles” with internet connection packs – the trend we are seeing with “zero rating” and Internet.org-style connectivity solutions. We must safeguard the basic principles and narratives of the free, open, neutral, and interoperable internet. It is those features that enabled the growth and development of this technology in the first place.

We do not assume a universally libertarian, anti-regulation position. We are most concerned by proposals that would require individuals or organisations that offer “OTT” internet applications or services to get a license or register with the government before they can make their services available in a country, mandating that they be deployed in the same highly controlled way that legacy telecommunications access services are deployed. **Instead, we believe that policymakers and regulators should push for context appropriate, fact-based regulatory models that defend and extend the rights of users, without jeopardizing the core principles that keep the internet free and open for innovation.**

With respect to protecting the rights of users, the TRAI and Department of Telecom deserve congratulations on helping set in place the global leadership increasingly being taken by India on safeguarding an open internet by advancing strong protections for net neutrality. The Prohibition of Discriminatory Tariffs for Data Services Regulations, 2016³ and the recently released substantive “Recommendations on Net Neutrality”⁴ are policy developments which

² Access Now, “Proposals For Regulating Internet Apps And Services: Understanding The Digital Rights Impact Of The “Over-the-top” Debate”, August 2017 (Accessible at https://www.accessnow.org/cms/assets/uploads/2017/08/Access_Now_OTT-position%E2%80%93paper.pdf)

³ Accessible at http://www.trai.gov.in/sites/default/files/Regulation_Data_Service.pdf

⁴ Accessible at http://www.trai.gov.in/sites/default/files/Recommendations_NN_2017_11_28.pdf

have not only secured an open internet for millions of Indian; they have helped set an example for the world.

Our detailed inputs to the consultation paper questions:

This submission answers the issues for consultations raised below :

Q.1 Which service(s) when provided by the OTT service provider(s) should be regarded as the same or similar to service(s) being provided by the TSPs. Please list all such OTT services with descriptions comparing it with services being provided by TSPs.

Q.2 Should substitutability be treated as the primary criterion for comparison of regulatory or licensing norms applicable to TSPs and OTT service providers? Please suggest factors or aspects, with justification, which should be considered to identify and discover the extent of substitutability.

Many telecom regulatory discussions are based on a definition of OTT services as referring to “applications and services, which are accessible over the Internet and ride on operators’ networks offering Internet access services.” This definition implies that internet applications are like traditional telecommunications applications, when they are not.

As the International Telecommunication Union (ITU) “ICT Regulation Toolkit” states: *“OTT services are enabled by the de-layering of the industry. IP has separated carriage from content and allowed ‘over-the-top’ content and applications providers to deal directly with end users over networks whose owners and operators are excluded from these transactions.”*

We disagree with the proposition that licensed telecom services and internet applications or services are substitutes for one another, and thus must be subject to exactly similar regulations. While they can offer similar functionality, they are based in different technologies that relate to state-level interests in a different manner. Telecommunications regulation is based on the exploitation of public goods (land use easements; exploitation of spectrum, etc.) that have scarcity or interference-related concerns. The regulation of internet services is related to specific protocols (TCP/IP; SMTP, P2P, etc.) and to the content of communications that travel through physical infrastructure. In the case of internet applications and services, there are no technical limits for the existence of multiple providers / suppliers.

We further submit that internet services do raise concerns that require appropriate regulation besides mandating telecom services style licensing or registration. We submit that the regulator can press on the Government and lawmakers to address issues of concern for users and work to keep the internet free and open, such as the protection of privacy, ensuring online

free expression, and preserving diverse channels for accessing information, competition, taxation, etc.

For that reason, **Access Now recommends context appropriate, fact-based regulatory models** that defend and extend the rights of users while keeping the internet free and open.

Examples of regulation that would **benefit users and protect rights in the debate regarding internet services and the telecom ecosystem** include:

- Safeguarding Net Neutrality in law;
- Protecting principles to keep the internet open to innovation and free expression, such as the end-to-end principle, open protocols, and the ability to communicate securely;
- Advancing meaningful data protection and privacy laws and measures to safeguard the rights of users;
- Extending connectivity through rights-respecting, equitable programs and infrastructure;
- Fighting corporate and government surveillance mechanisms and fostering the improvement of technical measures to protect privacy (including strong encryption);
- Holding companies accountable to their human rights obligations, particularly those relating to preventing harm to users — failing which, ensuring a focus on remedy and redress.

Q.3 Whether regulatory or licensing imbalance is impacting infusion of investments in the telecom networks especially required from time to time for network capacity expansions and technology upgradations? If yes, how OTT service providers may participate in infusing investment in the telecom networks? Please justify your answer with reasons.

Q.7 Is there an issue of non-level playing field between OTT providers and TSPs providing same or similar services? In case the answer is yes, should any regulatory or licensing norms be made applicable to OTT service providers to make it a level playing field? List all such regulation(s) and license(s), with justifications.

Q.8 In case, any regulation or licensing condition is suggested to made applicable to OTT service providers in response to Q.7 then whether such regulations or licensing conditions are required to be reviewed or redefined in context of OTT services or these may be applicable in the present form itself? If review or redefinition is suggested then propose or suggest the changes needed with justifications.

In addition to our recommendation for context appropriate and fact based regulatory models, we further submit that many of the economic arguments advanced to further telecom licensing-style regulation for internet applications or services have been contested by analysts and academia.

There is enough research to suggest that the expanding use of data services might actually benefit TSPs and thus OTT services increase investment in telecommunication infrastructure, rather than inhibiting it.⁵ Furthermore, a May 2017 paper from the consultancy Communications Chambers also argued, there is a “free rider” fallacy generally at play in this debate, arising out of a failure to recognize that internet applications can create demand for network access, and that application providers are in fact investing in telecom networks particularly with respect to servers and network infrastructure.⁶ We submit that apart from hindering the open nature of the internet, telecom-style licensing of internet services would not provide adequate economic benefit to the country.

Additionally, requiring individuals or companies to obtain a license in order to provide an internet application or service would interfere with the right to free expression under the current human rights law interpretation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR). A landmark report by the United Nations Special Rapporteur on the Freedom of Expression in 2011 spoke to this point, indicating that:

“Furthermore, unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the Internet, as it can accommodate an unlimited number of points of entry and an essentially unlimited number of users.”⁷

Q.4 Would interoperability among OTT services and also interoperability of their services with TSPs services promote competition and benefit the users? What measures may be taken, if any, to promote such competition? Please justify your answer with reasons.

⁵ See e.g.- Deepak Shenoy, Telcos are NOT Losing Money To Data Services, MediaNama.com, 16 April 2015 <http://www.medianama.com/2015/04/223-net-neutralitytelcos-are-not-losing-money-to-data-services-deep-ak-shenoy/> ; SaveTheInternet.in filing to Telecom Regulatory Authority of India consultation paper on differential pricing, <http://www.savetheinternet.in/files/diffpricing-cc.pdf> (pages 5 - 9, speaking to telco earnings call with respect to India and confidence in being able to grow and afford capital investments despite online services).

⁶ Brian Williamson: Communications Chambers, Deconstructing the “level playing field” argument – an application to online communications, May 2017, available at <http://static1.1.sqspcdn.com/static/f/1321365/27575015/1495793366237/LPFMay24.pdf?token=Axpym8wn4wb%2BAPWBXfpxyAkgLUE%3D>

⁷ United Nations - Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (while noting that “this does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation”),

We support the principles underlying interoperability and policy approaches that support users in being able to easily port their data in a manner where they are in control. We believe that this is best achieved via data portability mandates in data protection legal measures, and therefore urge that the TRAI should further impress the Union Government of the importance of urgently passing a comprehensive Privacy and Data Protection law for India that includes a right to data portability. We further submit that any regulation by the TRAI prescribing interoperability on internet services would be outside the ambit of its mandate and current legal powers, and the TRAI should refrain from regulating internet services directly in the absence of significant changes to the Telegraph and TRAI Acts.

Q.5 Are there issues related to lawful interception of OTT communication that are required to be resolved in the interest of national security or any other safeguards that need to be instituted? Should the responsibilities of OTT service providers and TSPs be separated? Please provide suggestions with justifications.

We submit that the legal framework for lawful interception in India urgently requires an overhaul. It is necessary that legal and institutional safeguards be put in place to curb misuse of interception orders, provide mechanisms in case of genuine need for interception and ensure secure communications that safeguard the fundamental right to privacy of Indian residents. The current surveillance infrastructure in India lacks proper transparency and accountability. It is completely under executive control, with no parliamentary or judicial oversight, either ex-ante or ex-post, of surveillance measures, in stark contrast to the situation in other countries such as Germany, South Africa, UK and the US. The report released by the Justice Srikrishna Committee on Data Protection noted that the lack of inter-branch oversight in surveillance, saying that it “is not just a gap that is deleterious in practice but, post the judgment of the Supreme Court in Puttaswamy, potentially unconstitutional.”

It is essential that the legal framework for lawful interception provide institutional checks and balances, which addresses the problematic current situation of complete control of the executive in this process. Parliamentary and judicial involvement in this process is essential, with the executive serving the role of an applicant. Such applications for interception should be then adjudicated on the threshold of “necessity and proportionality”⁸ - the requests should have a basis in law, must be necessary to achieve a legitimate aim, and proportionate to the aim pursued.⁹

The recent Ministry of Home Affairs notification, providing 10 agencies with interception, monitoring, and decryption powers under Section 69 of the Information Technology Act (IT Act), is concerning. We submit that TRAI must recommend to the government the overhauling of the lawful interception framework in India - both under the Telegraph Act (in case of

⁸ <https://necessaryandproportionate.org/principles>

⁹ Universal Declaration of Human Rights Article 29; General Comment No. 27, Adopted by The Human Rights Committee Under Article 40, Paragraph 4, Of The International Covenant On Civil And Political Rights, CCPR/C/21/Rev.1/Add.9, November 2, 1999;

telecommunication services) and the Information Technology Act, 2000 (in case of internet services).

Q.6 Should there be provisions for emergency services to be made accessible via OTT platforms at par with the requirements prescribed for telecom service providers? Please provide suggestions with justification.

We believe that any services that are licenses or partnered with entities that can offer VoIP services that can terminate into PSTN as per Indian regulations may require emergency service provisions to be clear. Beyond that, the present legal framework would not allow a mandate to this effect - though TRAI can encourage voluntary efforts and best practices for clear statements to users by those internet communication services of the fact that they do not provide emergency service calling in the same way as licensed telecom services.

We hope our inputs have been useful to TRAI and are available to further expand on our initial comments and provide any other assistance useful towards this consultation

Yours sincerely,

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PROPOSALS FOR REGULATING INTERNET APPS AND SERVICES: UNDERSTANDING THE DIGITAL RIGHTS IMPACT OF THE “OVER-THE-TOP” DEBATE

By Javier Pallero and Raman Jit Singh Chima

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INTRODUCTION

The “Over-the-Top” telecom regulatory debate impacts the open internet and human rights

Over the past two years, national regulators in the telecommunications and broadcasting sectors have often discussed regulatory proposals to impose new rules for what is known as “Over-the-Top” or “OTT”) services. These technical and acronym-laden regulatory discussions have significant implications for the future of the open internet and the digital rights of users.

Many proposals have specifically argued that so-called OTT services — comprising many of the internet applications and services that we all use every day — should be regulated in a manner similar to legacy telecommunications and internet access provider services. Initiatives to establish telecom sector-style regulation of “OTT” services are likely to have a significant impact on Net Neutrality specifically, as well as more widely on users’ rights to free expression, access to information, and the capacity of societies to harness the internet’s benefits for economic, social, and cultural development.¹

Without permissionless innovation and Net Neutrality (including the end-to-end principle), the internet would not be what it is today. And without smart policy responses to the OTT regulatory debate, we risk closing off avenues for innovation and free expression as technology advances, when we should be opening them.

What is “OTT”? Be cautious using this term

The term “Over-the-Top” or “OTT” is a tricky umbrella term. Many telecom regulatory discussions are based on a definition of OTT services as referring to “applications and services, which are accessible over the Internet and ride on operators’ networks offering Internet access services.”² This definition implies that internet applications are like traditional telecommunications applications, when they are not. As the International Telecommunication Union (ITU) “ICT Regulation Toolkit” states:

“OTT services are enabled by the de-layering of the industry. IP has separated carriage from content and allowed ‘over-the-top’ content and applications providers to deal directly with end users over networks whose owners and operators are excluded from these transactions.”³

The ITU’s ICT Regulation Toolkit doesn’t provide an exhaustive list of what constitutes “OTT,” instead indicating that Voice-over-Internet Protocol (VoIP) was the first “OTT concept,” a phrase demonstrating the nebulousness of the term. Other telecommunications regulators have noted that the definition needs work, and acceptance of the term can vary. Indeed, the national regulators chairing the ITU’s study group on this topic (ITU-T Study Group 3)⁴ stated:

“As yet there is no widely accepted definition of OTT. It is important that this is addressed by ITU, given that the definition will affect the scope of ITU’s analysis of OTT. Our current discussions consider OTT to be any Internet application that may substitute or supplement

[1] For example, placing additional restrictions on the ability for users and other actors to easily create and distribute web content will likely result in less locally relevant content on the internet, in turn impacting its overall value as well as failing to address demand-related factors that would otherwise have helped increase internet uptake.

[2] Commonwealth Telecom Organisation, CTO OTT Study, <http://www.cto.int/consultancy/cto-ott-study/>.

[3] International Telecommunications Union, ICT Regulation Toolkit / Competition and Price / Regulating Over the Top Services, <http://www.ictregulationtoolkit.org/toolkit/2.5.2>.

[4] <http://www.itu.int/en/ITU-T/about/groups/Pages/sg03.aspx>

traditional telecommunication services, from voice calls and text messaging to video and broadcast services.”⁵

That definition is very broad. In effect, the current telecommunications regulatory sphere could see nearly all services provided over the internet defined as “OTT” (that is, offered over the top layer of the network).

Use of the term in regulatory proposals can correlate to the interests of the stakeholders involved. Telecommunication providers use it to differentiate the services they provide on their own networks and under their brand (such as SMS, licensed voice, or enterprise communication services) from similar services that run over the internet and use internet protocols (e.g., services like WhatsApp, Viber, Skype). This can have regulatory advantages, favoring some players over others. For example, in some cases, those using the term can leverage it as a catch-all banner to push for more regulation of the internet services and content they choose, given that nearly everything on the application layer could be called “OTT.” Indeed, in some countries the debate over regulating so-called OTT services is taking place with regard to a wide variety of applications and services such as intermediation apps (e.g., Uber or Airbnb), and large online platforms (e.g., discussions about antitrust and web search, content quotas for video on demand, or social networks moderating user access to information).

With respect to telecommunications regulation, participants in the “OTT” discussion should use the term cautiously, since it can serve to understate the impact proposed regulations can have on the internet services, applications, and content that we use every day. We must recognize that when we use “OTT” in this context, we are referring not to a specialized subset of services but a broad spectrum of applications, services, and content that millions of people rely on. In this paper, we will refer to these services simply as “internet applications or services” where it does not cause confusion, since the phrase more accurately describes that broad spectrum.

Understanding what is at stake

In this paper, we focus primarily on the “OTT” regulatory debate in relation to the internet and telecommunications sector. Our specific area of interest is the debates before national authorities and in the international telecom regulatory sphere — often arising from arguments advanced by telecoms operators and some traditional content carriers — on whether to regulate “OTT services” in the same way that traditional communications and media technologies are regulated. Some of these proposed regulatory measures include:

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- ▶ Licensing or registration requirements with telecom authorities

 - ▶ Local content production requirements

 - ▶ Local data retention, storage, and law enforcement access requirements

 - ▶ Taxation as broadcasting services or telecommunications services

 - ▶ Universal Service Fund contributions

 - ▶ Local content funds contributions

 - ▶ Public service regulation (including telecom levies and license fees, government control and public service obligations)

[5] ITU Blog, Q&A: What’s the economic impact of ‘over-the-top’ (OTT) players, <https://itu4u.wordpress.com/2017/03/15/qa-whats-the-economic-impact-of-over-the-top-ott-players/>.

Within this framing, our primary concern is the impact proposed measures may have on human rights. In this regard, we are most concerned by proposals that would require companies that offer “OTT” internet applications or services to get a license or register with the government before they can make their services available in a country, mandating that they be deployed in the same highly controlled way that legacy telecommunications access services are deployed.

This type of regulation is a poor fit for internet applications or services, and would have negative consequences for internet users, potentially impacting free expression and the capacity for innovation. Specifically, requiring individuals or companies to obtain a license in order to provide an internet application or service would interfere with the right to free expression under the current human rights law interpretation of Article 19 of the International Covenant on Civil and Political Rights (ICCPR). A landmark report by the United Nations Special Rapporteur on the Freedom of Expression in 2011 spoke to this point, indicating that:

“Furthermore, unlike the broadcasting sector, for which registration or licensing has been necessary to allow States to distribute limited frequencies, such requirements cannot be justified in the case of the Internet, as it can accommodate an unlimited number of points of entry and an essentially unlimited number of users.”⁶

Some proposals for regulating “OTT” applications or services would also impact Net Neutrality. As the Global Network Neutrality Coalition states, “net neutrality requires that the Internet be maintained as an open platform, on which network providers treat all content, applications and services equally, without discrimination.”⁷ Mandating an “OTT” license or registration in order to be able to offer internet applications or services directly implicates these core principles. Internet users would no longer have an open platform for access to these applications or services without discriminatory interference at the telecommunications network level. Instead, their choices would be limited to the applications or services licensed or registered with telecommunications authorities.

In order to avoid regulatory outcomes that harm the open internet and the human rights of users, we propose the following high-level policy recommendations to guide engagements in OTT debates, which we explain in detail in the following section:

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- I. Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services.**
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- II. Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights.**
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[6] United Nations - Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, 16 May 2011, http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf (while noting that “this does not apply to registration with a domain name authority for purely technical reasons or rules of general application which apply without distinction to any kind of commercial operation”)

[7] Global Net Neutrality Coalition, This Is Net Neutrality, <https://www.thisisnetneutrality.org>.

How debate on regulation of “OTT” services is unfolding around the world

Listed are key policy and regulatory debates that illustrate the spectrum of discussion on so-called OTT services globally.

— LATIN AMERICA —

In **Brazil**, lobbyists have pushed for regulating or otherwise restricting the public availability of internet messaging applications such as [WhatsApp](#). Cinema regulatory agencies are also looking for authority to [tax](#) and [regulate](#) internet video-on-demand (VOD) services.

In **Uruguay**, lawmakers have proposed [new taxation rules](#) for internet applications and services. This follows a bill introduced last year to regulate “internet applications” [in general](#).

In **Colombia**, cable operators are [asking](#) for content quotas and broadcasting regulation for VOD services.

— ASIA - PACIFIC —

In **India**, lobbyists have campaigned before the Telecom Regulatory Authority of India (TRAI) to push for [a telecom licensing frameworks for “OTT” services](#). TRAI held [a regulatory workshop on the issue in August 2014](#) and issued a [consultation on “OTT” services and Net Neutrality](#) in March 2015. A committee of experts under the Union Government’s Department of Telecommunications prepared [a draft proposal to require licensing/oversight of communications application services](#) in August 2015. TRAI’s [most recent consultation paper on Net Neutrality](#) (issued in January 2017) delinks the issue of “OTT” regulation from the current policy and rulemaking exercise, though [industry groups have made submissions on “same service, same rules”](#) regulatory proposals to the Department of Telecommunications as it solicits input on drafting a new National Telecom Policy.

In **Vietnam**, the government issued a [draft “OTT” circular](#) in November 2014, which included regulations for internet-based voice and text messaging services and data localisation and mandates for local partnership. This regulatory circular appears not to have been enforced by Vietnamese authorities.

In **Thailand**, regulators are considering a proposal for “OTT content providers” that emerged in April 2017. The National Broadcasting and Telecommunications Commission (NBTC) [indicated](#) at the beginning of the summer 2017 that it would initiate a detailed regulatory consultation on the proposal, which is based on [a background document prepared by an external consultancy group](#), later in the year, and is considering implementing its approach here via its legislative proposals regarding the Telecom Business Act, the Broadcasting Business Act, and the Frequencies and Allocation Act. The NBTC has proposed a registration requirement for “OTT” video services, but as of late July 2017, it [appeared to reconsider and delay](#) the proposal for three months of further study and consideration.

In **Indonesia**, regulators [issued a set of rules for “OTT” applications and services in 2016](#), covering [a range of areas](#). In addition to setting forth rules for legal registration and permanent establishment in the country, the regulations also obligate providers of internet applications and services established outside of Indonesia to carry out content monitoring and comply with all government-issued requests.

How debate on regulation of “OTT” services is unfolding around the world

Listed are key policy and regulatory debates that illustrate the spectrum of discussion on so-called OTT services globally.

— MENA —

In **Morocco**, the Telecommunications Regulatory National Agency (ANRT) ordered [telcos to block Voice over IP \(VoIP\) services](#) in 2016 on the grounds that companies must have a telecommunications license for VoIP services to be made available in the country.⁸ After a court challenge, the block was lifted in November 2016.⁹

— SUB-SAHARAN AFRICA —

In **Kenya**, policymakers are considering proposals to require broadcast sector regulations for online video services like Netflix and [discussing “OTT” regulatory proposals or guidelines](#) for the ICT sector targeting internet services and online platforms.

In **Nigeria**, the Nigerian Communications Commission released a study titled [“An overview of provision of over-the-top services”](#) that analyzes the state and implications of “OTT” services in Nigeria. The commission proposes conducting “a stakeholder’s consultative forum on the provision of over-the-top services in Nigeria to determine if regulation is required for such services and its impact on the growth of the Nigerian Telecoms industry.”

In **South Africa**, the South African Parliament’s Committee on Telecommunications and Postal Services held [a hearing on “OTT Policy and Regulatory Options” in January 2016](#), with presentations by the government, the Independent Communications Authority, telcos, tech companies, and other interest groups. The [final report of the committee](#), published in March 2016, did not provide any specific recommendations or findings on the issue.

— GLOBAL: INTERNATIONAL TELECOMMUNICATIONS UNION —

The **ITU-T (ITU Telecommunication Standardisation Sector)** Study Group 3 has been tasked to study the economic impact of “OTT” services. [The work area is publicly listed](#) to include developing an “international standard on OTT,” and new work on two topics, namely the “Impact of OTT bypass” and “Partnerships between OTT players and mobile network operators.”

In June 2017, the **ITU’s Council Working Group on International Internet-related Public Policy Issues** [opened a consultation](#) on “Public Policy considerations for OTTs,” focusing on five topics for written input by August 2017 and a public meeting in September 2017:

- ▶ What are the opportunities and implications associated with OTT?
- ▶ What are the policy and regulatory matters associated with OTT?
- ▶ How do the OTT players and other stakeholders offering app services contribute in aspects related to security, safety, and privacy of the consumer?
- ▶ What approaches might be considered regarding OTT to help the creation of environments in which all stakeholders are able to prosper and thrive?
- ▶ How can OTT players and operators best cooperate at local and international level? Are there model partnership agreements that could be developed?”

[8] Middle East Eye, Morocco banned Skype, Viber, WhatsApp and Facebook Messenger. It didn’t go down well, 9 March 2016, <http://www.middleeasteye.net/columns/boycotts-appeals-petitions-restore-blocked-voip-calls-morocco-1520817507>.

[9] TeleGeography, Morocco lifts ban on OTT VoIP services, 7 Nov 2016, <https://www.telegeography.com/products/commsupdate/articles/2016/11/07/morocco-lifts-ban-on-ott-voip-services/>

OUR RECOMMENDATIONS

Our discussion above shows that in considering regulating “OTT” services, there are legitimate concerns for regulators, technical operators, businesses, and users. In that context, policymakers could apply a number of regulatory solutions, but these ought to address the particularities of the issues and service under scrutiny, rather than applying a single predetermined “fix.” Regulations could be applied ex post or ex ante, but the goals, the local context, and the interests at play should determine what they will be (versus, for example, applying new rules on a theory of achieving regulatory “parity” with telecommunications providers). Regardless of the regulatory proposal in question, stakeholders must take care to safeguard the fundamental rights of users and preserve the open internet as an engine for innovation and development. To achieve a rights-respecting, user-empowering regulatory model, we offer the following recommendations:

I. Avoid applying one-size-fits-all telecom-style licensing frameworks onto internet applications or services

Regulatory regimes should be fit-for-purpose. We ought not to apply telecom-style licensing regulations to internet services or mobile apps — even those offering online communication services — if they are not being launched or commercially offered as telecom services (which are precisely defined in most national telecommunications legal frameworks). This would subject them to licensing requirements or pre-government authorisations specific to the telecom or broadcast sector, and this can harm free expression and the open internet.

Be cautious about seeking to “level the playing field”: the difference between telecom services and internet applications or services

— TELECOM SERVICES —

There are strong public interest reasons for regulating telecommunications services and imposing specific obligations (such as “must carry,” neutrality, regulated pricing, etc.) For instance:

Telecommunications industries exploit scarce resources that belong to the “eminent domain” of states: namely telecommunications spectrum and in some cases infrastructure that was built by governments.¹⁰ This earlier thinking of “scarcity” in broadcast spectrum is key to understanding the “must carry” regulations often enforced on telecommunications,¹¹ and cable TV and the “content quotas” that are imposed on audiovisual service providers.¹² There is a public interest in protecting freedom of expression in all its facets and pluralism via “positive discrimination” when private players are granted exclusive or semi-exclusive rights to use public resources such as radiofrequency spectrum and common telecom physical infrastructure.

Additionally, the **exploitation of public resources by telecommunications operators implies an economic advantage** that is there from the beginning and that justifies regulations about investment quotas, universal service obligations, social tariffs, etc.

[10] This is especially true in the case of Latin America before the telecommunications liberalisation in the 90s.

[11] “Must-carry obligations... require certain television and or radio channels to be carried over certain networks” <https://www.twobirds.com/en/news/articles/2003/mustcarryrules>;

[12] “Countries with massive domestic markets like the United States and India have considered there is no need to protect the output of their cultural sectors and have not introduced content regulation... Other countries have responded with measures that include content quotas, direct subsidy, taxation concessions and the establishment of publicly funded broadcasters. Many have used a mix of measures.” http://musicinaustralia.org.au/index.php?title=Broadcasting_Content_Quotas_%E2%80%944_An_International_Overview

Be cautious about seeking to “level the playing field”: the difference between telecom services and internet applications or services

This advantage is economy of scale.¹³ This is particularly true these days when “triple-play” or “convergent” operators are appearing throughout the world. Not every company will be able to offer such efficient communications “bundles” or “packs”; meaning that the telecommunications markets have high barriers to entry and therefore are prone to cartelisation and concentration (lack of competition).

— INTERNET APPLICATIONS AND SERVICES (“OTT”) —

Meanwhile, in contrast:

The internet is defined by abundance, not scarcity.¹⁴ Even though there are services / protocols that serve the same function as telecommunications technologies (instant messaging, Voice over IP, video on demand, etc.), the reasons for regulating their use are different. The case for licensing-style regulatory intervention in the name of supporting either diversity or competition has not been made.

On diversity: On the internet, anyone who has access to the network can benefit from its neutral and open characteristics. Freedom and consumer choice are, by definition,¹⁵ often the main factor that decides what kind of content or service is popular. Moreover, since there are no fixed quotas or quantitative limitations to content, actors who have difficulty getting their own media outlets, or whose dissident or minority viewpoints deter broadcasters, can reach interested communities on the internet.¹⁶ In conclusion, the barrier of entry to the communications “market” on the internet is low enough that almost any interested party can operate a communications service or a media outlet, effectively supporting democratisation of speech. Where there are significant barriers to entry or network effects from dominant players impeding diversity or the functioning of the market, antitrust/competition law authorities certainly have a role and must engage.

On competition: In theory, economic actors “compete” to sell products or services that may offer similar value, and could serve as substitutes for one another. However, users are migrating in their choice of technologies rather than in the use of products or services; telecommunications services and services based on internet protocols are so different that they could barely be considered competing “substitutes.” Consider SMS vs. internet messaging apps like Viber, Signal, WhatsApp, or Snapchat: their business models are different (consumption vs. data exploitation); the technology they use is different; the barrier of entry to the market is different (and therefore the offering of alternatives is different); and their degree of availability to the public is different (there are messaging platforms that are open for everyone to use while others are closed or exclusive. Not having access to one of them does not imply endangering the right to communication, while not having access to SMS, for instance, leaves the user with very few or no available substitutes).

[13] During the telecommunications deregulation of the 90s in Latin America, telecommunications operators acquired privatized essential facilities that formerly belonged to the state and were provided with long-term concessions and territories for their exclusive exploitation. This led to *de facto* monopolies in different regions in countries which allowed them to set up very efficient cost structures. After the concessions ended and spectrum permits were put on public auction again, these players would count with a technological and cost structure that would allow them to be almost unbeatable.

[14] <https://www.wired.com/1997/09/newrules/>

[15] Violations of neutrality, shutdowns (on various forms), surveillance and its chilling effect, etc., are exceptions, but they also happen on telecommunications networks and other ICTs.

[16] This includes, but is not limited to: indigenous populations, citizen journalists, LGBTI collectives, localized / multilingual content creators, artists outside the copyright-driven production scheme, etc.

Safeguarding free expression and Net Neutrality requires treating “OTT” services — including Video on Demand (VOD), Voice over Internet Protocol (VoIP), mobile messaging, etc. — the way we treat any other kind of internet traffic. It is therefore crucial that we carefully examine proposals for new laws, regulations, or amendments to existing legal frameworks that would create telecom licensing-style rules for internet platforms and online services, as they would directly impact users’ capacity to enjoy their rights to free expression and access to information.

This does not mean that “OTT” services should never be subject to any regulation whatsoever. For instance, there may be exceptions if particular services use restricted public resources that integrate the licensed telecom layer. Such situations may require the adoption of some or all parts of national telecom regulatory requirements.

National governments may also consider economic regulatory proposals such as taxation measures for e-commerce or application/services sales taking place within their jurisdiction, as well as wider international regulatory discussions regarding transfer pricing with respect to ICT services. In any case, taxation schemes should consider the specific traits of different services and companies behind them so as not to represent a barrier of entry for small businesses.

II. Shape regulatory intervention of internet applications or services on a foundation that considers the public interest and human rights

Public policy for the internet (and convergent communications technologies) must consider the public interest in realizing fundamental rights and meet social needs in a manner that is respectful of local socio-cultural contexts. It is crucial to distinguish between a framework of regulating the technology itself and regulating human behavior while using the technology. Regulating the technology itself — without considering its social role and implications — can introduce inequalities. Regulating conduct can be easier, more targeted, and less a danger to technological innovation.

Nevertheless, not every attempt to regulate new technologies or business practices retards innovation or damages free expression. Legal frameworks and regulatory regimes can enable users to realize their digital rights and enjoy the other benefits the internet brings. Examples of a positive regulatory discussion include helping to clarify that companies running user-generated-content services should not be required to police and censor speech outside of legal process;¹⁷ or that rule-based smart spectrum allocation advances innovation and the public interest; or that policies that protect users’ data increases trust in new communication services.¹⁸

[17] A common illustration of this are frameworks to define and limit the liability of internet intermediaries, often referred to as intermediary liability laws.

[18] For instance, several telecom regulators have been acting to try to safeguard and strengthen legal measures to protect user data and privacy in telecommunications and mobile messaging. In the U.S., the Federal Communications Commission passed broadband privacy rules in 2016, though these were later repealed by the U.S. Senate after the 2016 elections (see <https://www.accessnow.org/access-now-condemns-u-s-senate-measure-gut-internet-privacy/>). The European Union is currently considering reforms to its e-Privacy package which would include a measure to clarify and strengthen oversight of “OTT” messaging services in order to safeguard user rights to privacy and confidentiality of communications (see <https://www.accessnow.org/europes-eprivacy-regulation-must-level-playing-field-users/>). The Indian TRAI also launched a new consultation process in August 2017 on the issue of privacy, security, and ownership of data in the telecom sector (see <http://traigov.in/consultation-paper-privacy-security-and-ownership-data-telecom-sector>).

When considering proposals to regulate internet applications or services, we must consider issues such as privacy and data protection, in addition to cross-cutting regulatory regimes such as consumer protection law, tax and transfer pricing, emergency and disaster response protocols, and antitrust scrutiny. Those issues and broader general-conduct legal standards are beyond the scope of this current paper, but they should be addressed, separately from the question of whether we should regulate “OTT” services the way we do telecom services.

We must be skeptical of arguments that telecom services and internet applications or services are perfect substitutes for one another. While they can offer similar functionality, they are based in different technologies that relate to state-level interests in a different manner.¹⁹ **We must also remember that many of the economic arguments advanced to further telecom licensing-style regulation for internet applications or services have been contested, with research finding, for example, that the expanding use of data services might actually benefit telcos.**²⁰

As a May 2017 paper from the consultancy Communications Chambers noted, there is a “free rider” fallacy generally at play in this debate, arising out of a failure to recognize that **internet applications can create demand for network access**, and that **application providers are in fact investing in telecom networks particularly with respect to servers and network infrastructure.**²¹

[19] I.e. telecommunications regulation is based on the exploitation of public goods (land use easements; exploitation of spectrum, etc.) that are have scarcity or interference-related concerns. The regulation of internet services is related to specific protocols (TCP/IP; SMTP, P2P, etc.) and to the content of communications that travel through physical infrastructure. In the case of internet applications and services, there are no technical limits for the existence of multiple providers / suppliers.

[20] See e.g.- Deepak Shenoy, *Telcos are NOT Losing Money To Data Services*, MediaNama.com, 16 April 2015 <http://www.medianama.com/2015/04/223-net-neutrality-telcos-are-not-losing-money-to-data-services-deepak-shenoy/>; SaveTheInternet.in filing to Telecom Regulatory Authority of India consultation paper on differential pricing, <http://www.savetheinternet.in/files/diffpricing-cc.pdf> (pages 5 - 9, speaking to telco earnings call with respect to India and confidence in being able to grow and afford capital investments despite online services).

[21] Brian Williamson: Communications Chambers, Deconstructing the “level playing field” argument – an application to online communications, May 2017, available at <http://static1.1.sqspcdn.com/static/f/1321365/27575015/1495793366237/LPFMay24.pdf?token=AxPym8wn4wb%2BAPWBXfpxyAkqLUE%3D>

CONCLUSION

“OTT” requires fact-based regulation that supports innovation and safeguards human rights

As we have noted, stakeholders in this debate must use the term “OTT” cautiously, since it can serve to understate the impact that some regulatory proposals can have on the internet applications or services that we use every day. Overbroad, telecom-style regulation and licensing can harm the open internet and the principles that sustain our enjoyment of digital rights, impacting in particular permissionless innovation, Net Neutrality (including the end-to-end principle), and low barriers of entry.

Thus, we should counter the trend towards the commoditization of the internet, where applications are licensed separately and offered in “bundles” with internet connection packs — the trend we are seeing with “zero rating” and Internet.org-style connectivity solutions. We must safeguard the basic principles and narratives of the free, open, neutral, and interoperable internet. It is those features that enabled the growth and development of this technology in the first place.

Nevertheless, we cannot assume a universally libertarian, anti-regulation position. Instead, we should **push for context appropriate, fact-based regulatory models** that defend and extend the rights of users, without jeopardizing the core principles that keep the internet free and open for innovation.

Examples of regulation that would **benefit users and protect rights** include:

- ▶ **Safeguarding Net Neutrality in the law;**
- ▶ **Protecting principles to keep the internet open to innovation and free expression, such as the end-to-end principle, open protocols, and the ability to communicate securely;**
- ▶ **Advancing meaningful data protection and privacy laws and measures to safeguard the rights of users;**
- ▶ **Extending connectivity through rights-respecting, equitable programs and infrastructure;**
- ▶ **Fighting corporate and government surveillance mechanisms and fostering the improvement of technical measures to protect privacy (including strong encryption);**
- ▶ **Maintaining clear emergency services communication solutions; and**
- ▶ **Holding companies accountable to their human rights obligations, particularly those relating to preventing harm to users — failing which, ensuring a focus on remedy and redress.**

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