Response to ITU CWG-Internet Online Open Consultation: Public Policy considerations for OTTs

August 19, 2017

SUMMARY:

We thank the ITU for this opportunity to provide comments to this open consultation. Our inputs here are derived from a longer policy paper entitled "Proposals for regulating internet apps and services: Understanding the digital rights impact of the 'Over-the-Top; debate" soon to be published by Access Now.[1]

We 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 should **push for context appropriate, fact-based regulatory models** that defend and extend the rights of

[1] Our earlier online series on this topic is accessible on the Access Now website, see https://www.accessnow.org/watch-bad-regulation-ott-services-can-risk-rights/, https://www.accessnow.org/learn-share-comparing-ott-telecom-services/, https://www.accessnow.org/learn-share-comparing-ott-telecom-services/

users, without jeopardizing the core principles that keep the internet free and open for innovation. In order to avoid regulatory outcomes that harm the open internet and the human rights of users, policymakers should follow two principles:

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.

Responses to the specific questions posed in the open consultation on 'Public Policy considerations for OTTs':

Inputs to Consultation Question 1: What are the opportunities and implications associated with OTT?

OTT services provide a wide variety of opportunities for users in terms of human development and rights. Much of the benefits that the internet provides to users in terms of economic development and the exercise of fundamental rights -including those of freedom of expression and access to information - come from the use of applications and services that are deployed "on top" of the infrastructure layer. As the International Telecommunication Union (ITU)'s own "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."[2]

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.

For that reason, we will refer to OTT services and internet applications and services as synonyms in this text.

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

The opportunities provided by OTTs for economic development and the exercise of rights are huge. And so are the implications of regulating them in a hasty way, without considering the nuances and particularities applicable in each case. Internet application and services have enabled new forms of expression, political participation, economic development and cultural flourishing. This is due to the "end to end" nature of the internet and to the principle of net neutrality. Both of them establish a non-discriminatory principle that users benefit from. The internet also has allowed private communications technologies that make political participation and journalism easier while diminishing the risks for activists and journalistic sources. Private communications technologies are also essential for safe communications between ordinary users as well, specially in a context of new threats such as cybercrime and governmental mass surveillance.

Inputs to Consultation Question 2: What are policy and regulatory matters associated with OTT?

The main regulatory matter in terms of OTTs is the need to ensure the protection of fundamental rights of users. Please note that we don't refer to users as mere "consumers" since the rich interaction that internet applications provide has allowed otherwise "passive" users to become content producers, active communicators and potential entrepreneurs.

Nation states are the guardians and guarantors of fundamental rights and should therefore take action to ensure their enjoyment. Nevertheless, the actions that the government takes to regulate OTT internet services and applications can constitute a harm to users' rights in themselves. This is particularly true when a "one size fits all" approach is adopted and legacy telecommunications regulation is applied to internet applications and services without special consideration.

Our primary concern is the impact that proposed measures for "OTT" internet services and applications 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.

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."[3]

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."[4] 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.

We elaborate further on the point of unfitting legacy telecom regulation in answer to question number 4.

Inputs to Consultation Question 3: How do the OTT players and other stakeholders offering app services contribute in aspects related to security, safety and privacy of the consumer?

Because of the wide variety of applications and services that are offered on the internet, the answer to this question is not unique. As we have been discussing, the concept of OTT services can be used to describe different situations, some of which are better for user safety than others. For the same reason, we reiterate the need to analyze these issues from the perspective of internet users - who are not merely consumers but potential entrepreneurs, political actors, cultural collectives and empowered minorities.

In this regard, different applications and services offer different levels of protection for security, safety and consumer privacy. The deployment of strong encryption in communications services benefits the right of users to securely communicate and enables the protection of journalistic sources, political activists and everyday users against cybercrime and unlawful surveillance.

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[3] 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"),
[4] Global Net Neutrality Coalition, This Is Net Neutrality, https://www.thisisnetneutrality.org.

Most application and services providers do their best to comply with data protection regulations at a national level. On the other hand, there is room for improvement in both national legislation and the practices of some companies in issues such as the "right to be forgotten"[5], mandatory data retention[6] and data protection.

All of those issues represent clear dangers for user privacy. Governments and companies should work together to ensure efficient mechanisms for data protection that also have the public interest and freedom of expression in mind. In order to achieve that, it is necessary to emphasize the participation of civil society and other stakeholders in transparent processes that avoid the "privatisation" of the application of the law, to the detriment of public interest.[7] There are efforts that policymakers can take that protect users' data and in turn increase trust in new communication services. 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 controversially repealed by the U.S. Senate after the 2016 elections.[8] 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.[9] India has seen the TRAI launch a new consultation

[5] The Google Spain ruling has led to one of the most engaged discussions on the interaction between the right to privacy and free expression worldwide, two fundamental rights that are mutually reinforcing. However, a misinterpretation of the right to de-list, such as an implementation outside a comprehensive data protection law and with inadequate transparency, poses a significant threat to human rights, in particular the right to receive and impart information. For more information, see Access Now (2016) Understanding the Right to be Forgotten Globally. Available at https://www.accessnow.org/cms/assets/uploads/2016/09/Access-Not-paper-the-Right-to-be-forgotten.pdf

[6] In 2014, the Court of Justice of the European Union ruled that the Data Retention Directive interfered with fundamental rights. The Court acknowledged that processing and accessing personal data by authorities constitutes a "serious interference" with the rights to privacy and data protection as guaranteed under the EU Charter of Fundamental Rights. Such an interference therefore must be justified in accordance with the principles of necessity and proportionality. In this case, the Court concluded that the Data Retention Directive fails to meet these criteria, rendering the interference with these rights unjustified. The ruling can be found here http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30db64b73b07787a4f539fdea33356c73fe9.e34KaxiLc3qMb40Rch0SaxuNaN50?text=&docid=150642&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=467902

[7] It is for the courts to interpret and clarify the de-listing criteria set by the law, and to evaluate its application, if necessary. Private actors should not be required, nor should they be authorised, to determine the validity of a de-listing request, and they should not be put in a situation where they have a de facto judicial role over content. If legislation is not clear regarding liability, companies may perform excessive de-listing of content, risking unnecessary, disproportionate limitation of free expression outside the rule of law. Instead, search engines should follow clear assessments from, or direct orders by, competent judicial authorities. (Access Now, 2016. Understanding the Right to be Forgotten Globally. Available at https://www.accessnow.org/cms/assets/uploads/2016/09/Access-Not-paper-the-Right-to-be-forgotten.pdf)

[8] https://www.accessnow.org/access-now-condemns-u-s-senate-measure-gut-internet-privacy/

[9] https://www.accessnow.org/europes-eprivacy-regulation-must-level-playing-field-users/

process in August 2017 on the issue of privacy, security, and ownership of data in the telecom sector.[10]

Inputs to Consultation Question 4: What approaches might be considered regarding OTT to help the creation of environment in which all stakeholders are able to prosper and thrive?

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 legacy 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. This would subject them to licensing requirements or pre-government authorizations specific to the telecom or broadcast sector, and this can harm free expression and the open internet.

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 alter basic net neutrality principles. Net neutrality, as a principle of non discrimination, ensures the free flow of information and the enjoyment of free expression on the internet.

These principles do 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 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

[10] http://trai.gov.in/consultation-paper-privacy-security-and-ownership-data-telecom-sector

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 – with considering its social role and implications – can introduce inequalities. Regulating conduct can be easier, more targeted, and less a danger tor 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;[11] 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.[12]

Inputs to Consultation Question 5: How can OTT players and operators best cooperate at local and international level? Are there model partnership agreements that could be developed?

Ultimately, every company in the business of information, from the smallest startup to the biggest multinational telco, has a vested interest in expanding the quality and quantity of access robustly and equitably.[13] For this reason, internet application and service providers

[11] A common illustration of this are frameworks to define and limit the liability of internet intermediaries, often referred to as intermediary liability laws.
[12] We have spoken further in detail on this earlier in our response to the preceding consultation question number 3.
[13] We note that research findings increasingly indicate that internet applications create demand for network access - increasing revenue for telecom operators in turn - and that application providers are in fact investing in telecom networks particularly with respect to servers and network infrastructure. For a more recent report disputing the OTT "free rider" fallacy often advocated by some in the telecom industry, see 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%2BAPWBXfxpyAkgLUE%3D

should collaborate to advance human rights protections for internet users. There are several models that are being studied or implemented and they often include principles and mechanisms for collaboration within a human rights framework.

Prominently, the Global Network Initiative is a multistakeholder group that includes companies, civil society, academics and investors, and its membership continues to grow since its 2008 inception. Together the GNI members commit to a set of principles, implementation guidelines and accountability frameworks to support freedom of expression and privacy from unlawful government measures and incompatible business practices. The group includes telecommunications operators and internet companies alike[14], who undergo assessments and engage formally and informally with diverse stakeholders.

A basic set of human rights obligations for companies – both telcos and internet applications/services – can be found in the UN Guiding Principles on Business and Human Rights from 2011. The 31 high-level, cross-industry Guiding Principles, each with a corresponding "Commentary," help stakeholders to implement policies which fulfill their human rights obligations under the Protect, Respect and Remedy Framework. The Framework is often referred to as the Ruggie Framework, after its author, John Ruggie, professor of human rights and international affairs at Harvard, whose years of multistakeholder consultations informed the final document.

The Framework rests on the interconnection of the three pillars of "protect," "respect," and "remedy." The first pillar of the Framework affirms the state's duty to protect against human rights abuse. The second pillar clarifies the business sector's responsibility to respect, prevent, and mitigate infringement of human rights in their operations. The third pillar emphasizes the shared responsibility of both parties to provide those affected by adverse human rights impacts with access to judicial and non-judicial remedies.

Corporations in many industries have endorsed the Ruggie Framework and Guiding Principles [15]. Stakeholders have sought to guide their actual implementation by producing secondary literature and projects exploring the Framework and Principles.[16] We believe the UN Guiding

[14] More information about the Global Network Initiative, its membership and principles can be found in their official website at https://www.globalnetworkinitiative.org/

[15] See for example Coca-Cola http://www.coca-colacompany.com/our-company/human-workplace-rights; GE http://www.gecitizenship.com/focus-areas/economy/public-policy; & Vodafone http://www.vodafone.com/content/index/about/about_us/privacy/human_rights.html

[16] For exploration of the Third Pillar and the right to remedy, see: Caroline Rees, Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned, http://shiftproject.org/sites/default/les/report_46_GM_pilots.pdf; Caroline Rees & David Vermijs, Mapping Grievance Mechanisms in the Business and Human Rights Arena, http://shiftproject.org/sites/default/les/Report_28_Mapping.pdf; BASESwiki, http://baseswiki.org/en/Main_Page; FIDH, Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms. http://www.dh.org/Updated-version-Corporate-8258; Ludwig Boltzmann Institute of Human Rights, The Right to Remedy, http://bim.lbg.ac.at/les/sites/bim/Right%20to%20Remedy_Extrajudicial%20Complaint%20Mechanisms_2

Principles should serve as the basis for more rights-respecting policy development in the ICT sector, in ways that the Special Procedures of the Human Rights Council are beginning to elaborate.[17]

That said, there remains room for more models of dialogue and collaboration. Internet applications/services and operators are in a unique position to work together toward innovative solutions in the face of internet shutdowns,[18] government surveillance, and other violations of fundamental rights online.

With regard to shutdowns, telecommunications companies have a major role to play by publicly denouncing these blunt forms of censorship, exposing their devastating impacts on digital economies, and publicly disclosing information about the reach of the blocking orders they receive from governments[19]. In other cases, operators may appeal disproportionate judicial orders to collaborate with application providers. That was the case in Brazil in 2015, when WhatsApp and telecommunications operator Oi issued appeals against the order to block Whatsapp nationwide[20]. The UN Guiding Principles on Business & Human Rights encourage this sort of rights-respecting action to apply international human rights law and defend the rights of affected ICT user groups.

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013_1.pdf; SOMO, Human Rights and Grievance Mechanisms, http://somo.nl/publications-en/Publication_3823?set_language=en; & Tineke Lambooy, et al, The Corporate Responsibility to Remedy, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953190

[17] See for example: David Kaye, Special Rapporteur on the freedoms of opinion and expression, "Report to the Human Rights Council," 30 March 3017, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22. Additional steps and recommendations for operators can be found at Access Now's Telco Remedy Plan, available at https://www.accessnow.org/cms/assets/uploads/archive/docs/Telco_Remedy_Plan.pdf

[18] On 1 July 2016, the UN Human Rights Council (HRC) unequivocally condemned "measures to intentionally prevent or disrupt access to or dissemination of information online", and called on States to desist and refrain from such practices (A/HRCRes/32/13). For its part, the Freedom Online Coalition group of 30 countries recently expressed concern on intentional disruptions, or internet shutdowns, and offered guidance to governments on avoiding their devastating impacts. See https://www.freedomonlinecoalition.com/news/foc-issues-joint-statement-and-accompanying-good-practices-for-government-on-state-sponsored-network-disruptions.

[19] For more information, see the civil society open letter to telecommunications companies in Ghana from February 2017 https://www.accessnow.org/open-letter-telecommunications-companies-cameroon-internet-shutdown/

[20] Brazil's Whatsapp Ban: The In and Outs. Folha de Sao Paulo. 2015. Available at http://frombrazil.blogfolha.uol.com.br/2015/12/18/brazils-whatsapp-ban-the-ins-and-outs/