

## INTRODUCTION

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ARTICLE 19 welcomes the efforts of the ITU and its Council Working Group on International Internet-Related Public Policy Issues (CWG-Internet) to engage in a multistakeholder process by holding this Open Consultation. We appreciate the opportunity to provide the Working Group with our position on the Public Policy Considerations of Over the Top Services (OTTs), and we look forward to the discussions that will follow in September at the physical meeting in Geneva.

ARTICLE 19 is an international human rights organization that works to protect and promote the right to freedom of expression, which includes freedom of the press and the right to information. With regional offices in Africa, Asia, Europe, Latin America, and the Middle East and North Africa, we champion freedom of expression at the national, regional, and international levels. The work of ARTICLE 19's Digital Programme focuses on the nexus of human rights, Internet infrastructure, and Internet governance. We actively participate in forums across the Internet governance and standards development landscape, including the Internet Corporation of Assigned Names and Numbers (ICANN), the Internet Engineering Task Force (IETF), the Institute of Electrical and Electronics Engineers (IEEE), and the Internet Governance Forum (IGF).

### General Reservations on the Scope of this Consultation

Since its foundation in 1865, the ITU has positioned itself as an international organization that facilitates a cooperative framework through which Members may strengthen the connectivity and interoperability of communications infrastructure around the world. Over time, the mandate of the ITU has grown to address issues of global Internet infrastructure. The ITU's focus on Internet-related issues has recently manifested in efforts to develop a program of work on OTTs, particularly within the ITU-T and ITU-D. It is in this context that ARTICLE 19 retains several fundamental concerns, which we believe must be addressed before we can meaningfully respond to the content of this Consultation.

**The use of the term "OTT" is problematic.** The ITU's protracted use of "OTT" as a term and concept reflects a fundamental misunderstanding of how the Internet operates. When we consider what IP-based services run over telecommunication networks, it is quickly clear that "OTT" encompasses *everything*: all Internet applications run over this infrastructure to facilitate the creation and dissemination of content. In the context of this Consultation, then, two major problems immediately arise. The term "OTT" is so overbroad as to lose salience; it is neither possible nor prudent to discuss regulation of the application layer of the Internet as a monolith. Moreover, the mandate of the ITU does not extend to the application layer at all. If there is any consideration of OTTs within the ITU, then it must be expressly limited to its relevance to transnational telecommunication infrastructure.

Even when restricted to Internet telephony services, "OTT" is not a neutral term. It implies a contentious dichotomy between IP-based services and other telecom services, as it falsely suggests that Internet applications exploit the network and usurp other services that are competing for the same network resources. Framing the discussion of IP-based services in terms of "OTT" obstructs a full and robust

consideration of their policy and regulatory implications in the context of national and transnational telecommunication.

**The ITU has yet to clearly establish the scope of the term.** OTT is already an explicit part of the work programs of both the ITU-D and the ITU-T. ITU-D Study Group 1, on “Enabling environment for the development of telecommunication/ICTs”, directly addresses OTT services in Question 1/1 on the policy, regulatory, and technical aspects of the migration from existing networks to broadband networks in developing countries.<sup>1</sup> ITU-T Study Group 3, on “Economic and policy issues”, has included OTT in the scope of Question 9/3 on the economic and regulatory impact of new Internet services on international telecommunication services and networks.<sup>2</sup> However, ITU Members have been unable to come to a consensus on what services may be considered “OTT” within the mandate of the ITU. During WTSA-16, discussions on two draft new resolutions on OTT devolved into a protracted deadlock, as Members failed to agree on the scope of the term. In fact, the use of “OTT” itself was called into question during the discussion, as Members briefly grappled with alternative terms that would comply with the mandate of the ITU, including “alternative voice and messaging services” and “online services for voice and messaging that require access to public numbering resources”. The lack of consensus in these discussions demonstrates the conceptual problems regarding the use and application of the term “OTT”.

Without a clear and limited scope, the term “OTT” may be captured and applied in ways that have grave consequences for the future of the Internet. Any regulation of the application layer of the Internet impacts users’ ability to access and disseminate content online. As such, the development of policy and regulatory frameworks for “OTT” services, which may be defined to encompass any and all Internet applications, has the potential to facilitate the restriction of the Internet as a free and open civic space, with major implications for human rights including freedom of expression, privacy, and freedom of association. **The consideration of the public policy implications of OTT in turn holds implications for the foundational principles of the global Internet architecture.**

## Structure of this Submission

This Consultation encompasses five questions. However, in the context of these general concerns, ARTICLE 19 limits this submission to responding only to Question Two as proposed by the CWG-Internet for the purpose of this Consultation:

What are the policy and regulatory matters associated with OTT?

ARTICLE 19’s position maintains that any effort to develop policies or regulation regarding OTT services must consider that these services are fundamentally different from telecommunication services and that they have major implications for the human rights of Internet users.

Because of these considerations, the ITU is not the appropriate forum for general discussion of OTT services, as it has neither the mandate nor the capacity to do so. Nevertheless, ARTICLE 19 recognizes that the ITU may address Internet telephony services as they strictly relate to transnational telecommunication

<sup>1</sup> *ITU-D Study Groups*, ITU, <http://www.itu.int/net4/ITU-D/CDS/sg/rgqlist.asp?lg=1&sp=2014&rgq=D14-SG01-RGQ01.1&stg=1> (last visited Aug. 17, 2017).

<sup>2</sup> *List of Questions*, ITU, <https://www.itu.int/en/ITU-T/studygroups/2017-2020/03/Pages/questions.aspx> (last visited Aug. 17, 2017).

networks to produce non-normative outputs in this context. Where this occurs, we urge the ITU to continue considering the use of a new term to replace “OTT” that would reflect this more limited scope. Furthermore, we encourage ITU-D Study Group 1 and ITU-T Study Group 3 to consider these OTT services not simply in terms of competition with other telecom services, but to meaningfully consider how they may complement and strengthen the adoption and expansion of telecommunication infrastructure.

## QUESTION TWO

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What are the policy and regulatory matters associated with OTT?

The increase in global reliance on Internet telephony services such as WhatsApp, Facebook Messenger, and Skype in recent years have led some state, business, and civil society actors to call for greater regulation of OTT. Though we accept that there are matters of OTT services for which it may be prudent to consider developing transnational policy or regulatory frameworks, we also recognize that any regulation of OTT services would have major implications for Internet users around the world. As such, it is not sufficient to determine the appropriate policy and regulatory matters associated with OTT. We must also determine which forums are appropriate for hosting these discussions and any policy or regulatory development that may follow.

### 1. Major Policy and Regulatory Considerations of OTT

#### 1.1 Telecom versus OTT

Many of the calls from states and telecom network operators for greater regulation of Internet telephony services argue in favor of reining them in under the same policy or regulatory frameworks that govern telecom services such as voice calling and SMS. However, these categories are not the same. **Telecom services operate at the infrastructure layer of the Internet; Internet telephony services, on the other hand, operate at the application layer.**

Though this point may appear to be a semantic distinction, telecom services and OTT services operate within fundamentally different market environments as a result. Telecom service providers must capture public resources such as spectrum and infrastructure. Because these resources are limited, the capacity for new actors to enter the market is also limited and the market is susceptible to monopolistic practices. Internet applications, however, capitalize on connectivity: there is robust competition for Internet users, who function as both consumers and creators of content. As such, IP-based services do not use the same incremental pricing structure of telecom services, by which a consumer would be charged for voice calling by the minute, for example.

It is perhaps easy to conflate these categories of services by noting that, ostensibly, they are directly competing by offering products that provide similar functions. However, robust competition is not a consideration for developing regulatory policies or frameworks for OTT services. Moreover, any such policies or frameworks that do regulate OTT services must recognize that they operate under different market dynamics from telecom services. This position is supported by both the UN and OAS Special Rapporteurs on Freedom of Expression, who have jointly asserted that “approaches to regulation developed for other means of communication—such as telephony or broadcasting—cannot simply be transferred to the Internet but, rather, need to be specifically designed for it.”<sup>3</sup>

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<sup>3</sup> UN Special Rapporteur on Freedom of Expression & OAS Special Rapporteur on Freedom of Expression, *Joint Declaration on Freedom of Expression and the Internet* (2011), available at <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=849&IID=1>

## 1.2 Public Interest and Human Rights

As discussed in the Introduction of this submission, OTT services encompass *all* Internet applications, which serve as the platforms upon which users can connect and interact with each other across the network, accessing and disseminating information online. As such, the application layer of the Internet makes connectivity meaningful: it determines the Internet's capacity to function as a civic space and facilitate economic and social development globally. **Therefore, any regulation of OTT services must be driven by the public interest:** regulation of Internet services should not be a matter of course, but a targeted and specific response to protect the interests of Internet users. **This public interest should be determined through the application of the international human rights framework.**

Certainly, regulatory responses to OTT services may be necessary to ensure the protection of consumers under this framework, primarily in the context of the privacy and security of Internet users. The UN Special Rapporteur on Freedom of Expression, David Kaye, has already recognized the importance of securing IP-based communication services, calling upon business actors to adhere to existing policy frameworks that uphold human rights norms, including the UN Guiding Principles on Business and Human Rights.<sup>4</sup> Additionally, the UN General Assembly recently issued a landmark Resolution on the right to privacy in the digital age, which emphasized the need for strong data protection principles by which the private sector should operate.<sup>5</sup>

However, we must be clear: developing policy or regulatory responses to the proliferation of OTT services is not a catch-all solution. Even when doing so in the public interest, the regulation of OTT services may have consequences that ultimately compromise human rights further due to implications it may have for the production and dissemination of online content. For example, the regulation of OTT services may result in:

- **Stifling innovation.** Through measures that dampen competition or create barriers for new entrants, regulation may limit innovation, which drive the plurality of OTT services that may be accessed by Internet users. As a result, Internet users will have fewer opportunities for accessing information and exercising free expression.
- **Violating net neutrality.** Shutting down or throttling certain OTT services will contravene content agnosticism, on which the global Internet architecture is premised; the loss of certain platforms that Internet users primarily rely on may significantly limit free expression and access to information, while facilitating censorship.

Unless the policy and regulatory matters of OTT are discussed in the context of the human rights framework, there is a clear danger that the outcomes will threaten the openness of the Internet.

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<sup>4</sup> UN Special Rapporteur on Freedom of Expression David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2015), UN Doc A/HRC/29/32.

<sup>5</sup> UN Human Rights Council, *Resolution on the right to privacy in the digital age* (2017), UN Doc A/HRC/34/L.7/Rev.1.

## 2. The Role of the ITU Regarding OTT

As discussed above, policy and regulatory consideration of OTT services bears major implications for Internet users around the world. Therefore, we must also consider the appropriate forums within which the relevant discussions and decision-making processes should be held. **Though ARTICLE 19 recognizes that, under limited circumstances, the discussion of OTT services may be within the remit of the ITU, we generally contend that the ITU is *not* the appropriate forum for the discussion or consideration of any general policy or regulatory aspects of OTTs.** Specifically, we have two concerns:

- **The ITU does not have the appropriate mandate.** The ITU may develop technical and policy considerations only on issues of transnational telecommunication networks, which primarily concerns infrastructure. However, we have already recognized that OTT services do not operate at the infrastructure layer. Moreover, regulatory or policy considerations of OTTs will have implications for online content, which is explicitly beyond the authority of the ITU.
- **The ITU does not have the appropriate structure.** The Internet is a civic space; therefore, any consideration of regulation or policy of its application layer or the services that run on it must be done in a multistakeholder environment that is inclusive and transparent. Though we commend the CWG-Internet for opting to open this Consultation to all stakeholders, the decision-making processes of the ITU remain opaque and restrictive to non-state stakeholders, especially marginalizing civil society. As such, the ITU does not have the capacity to meaningfully engage with the human rights considerations that we have established to be necessary to any regulatory or policy development on matters of OTTs.

ARTICLE 19 recognizes that both the ITU-D and the ITU-T have respectively established ongoing mandates for programs of work on OTTs. **To comply with its remit, the ITU may consider the policy and regulatory aspects of IP-based communication services only to the extent that they relate to transnational telecommunication networks under the current programs of ITU-D Study Group 1 and ITU-T Study Group 3.** Where applicable, these study groups may put forth non-normative outputs, such as reports and white papers. Nevertheless, the ITU should commit to the following:

- **The use of “OTT” should be replaced with a more narrowly defined term.** The use of “OTT” is technically problematic and overbroad for the ITU’s mandate. The ITU should continue to develop and implement a more restrictive alternative term that applies only to Internet applications that provide communication functions similar to telecom telephony services.
- **Considerations of the impact of OTT services on telecommunication networks and services should not be framed solely in a competitive capacity.** We recognize that it may be prudent for the ITU to consider the policy and regulatory implications of OTT services in the context of telecom services; however, the ITU’s membership has thus far largely addressed these dynamics in terms of competition. As we have previously discussed, though it may appear that OTT services directly compete with telecom services to provide consumers with similar communication functions, these services actually operate in different market environments. We strongly encourage the ITU to reassess the “free rider” narrative of OTT services to meaningfully consider how IP-based services may actually complement telecommunication networks. For example, the relevant study groups may further consider how consumer demand for OTT services in turn creates demand for network access and infrastructure expansion.

DEFENDING FREEDOM  
OF EXPRESSION AND INFORMATION