**Note by the Chairman of EG-ITRs**

For the reference of members of EG-ITRs, the following principles were applied in preparing the first draft of the final report of EG-ITRs:

1. The content is based on (a) the written contributions received as input to the first and second meetings of EG-ITRs, and (b) the corresponding meeting reports of the two meetings which capture the discussions among members on the contributions. This is a fundamental aspect in ensuring that the process to draft the final report is contribution-driven, and for the purposes of traceability and transparency.

2. The various views have been accommodated and a balanced approach has been maintained in representing the different views, as far as possible. Some aspects may have been paraphrased for language or brevity, or for the purposes of consolidating multiple contributions putting forth a similar view.

**I hope these principles are acceptable for your consideration.**

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| **Expert Group on the International Telecommunication Regulations (EG-ITRs)** |  |
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|  | **Document EG-ITRs/REP/DRAFT 1.0-E** |
| **31 October 2017** |
| **English only** |
| first draft of the FINAL REPORT OF the expert group on the international telecommunication regulations  |

1. **Introduction**

**1.1** In accordance with ITU Plenipotentiary Resolution 146 (Rev. Busan, 2014), the ​ITU Council, at its 2016 Session, adopted Resolution 1379, which resolves that an Expert Group on the International Telecommunication Regulations (EG‑ITRs), open to all Member States and Sector Members, be created.

**1.2** The Terms of Reference of the Group, as stated in Annex 1 of Council Resolution 1379, is as follows:

*1. On the basis of contributions submitted by Member States, Sector Members and inputs from the Directors of the Bureaux if necessary, the EG-ITRs shall undertake a review of the 2012 ITRs, taking into account new trends in telecommunications/ICT, emerging issues and obstacles that may arise from the implementation of the 2012 ITRs and WCIT-12 Resolutions and Recommendations.*

*2. The review should include among others:*

*a) An ehxamination of the 2012 ITRs to determine its applicability in a rapidly evolving international telecommunication environment, taking into account technology, services and existing multilateral and international legal obligations as well as changes in the scope of domestic regulatory regimes;*

*b) Legal analyses of the 2012 ITRs;*

*c) Analyses of any potential conflicts between the obligations of signatories to the 2012 ITRs and signatories to the 1988 ITRs with respect to implementation of the provisions of the 1988 and the 2012 ITRs.*

*3. The EG-ITRs will present a progress report to Council 2017 and a final report to Council 2018 for examination and submission to the 2018 Plenipotentiary Conference with the Council’s comments.*

**1.3** Council 2016 appointed Mr. Fernando Borjón (Mexico) as the chairman of the Group. Council 2017 appointed six vice-chairs as follows:

1. Mr. Guy-Michel Kouakou (Côte d'Ivoire)
2. Mr. Santiago Reyes-Borda (Canada)
3. Mr. Al Ansari Al-Mashakbeth (Jordan)
4. Mr. Xiping Huang (China)
5. Mr. Aleksei S. Borodin (Russian Federation)
6. Mr. Fabio Bigi (Italy)

**1.4** In accordance with Council Res. 1379, EG-ITRs held four physical meetings:

a. First meeting: 9 - 10 February 2017

b. Second Meeting: 13 - 15 September 2017

c. Third meeting: 17- 19 January 2018

d. Fourth meeting: 12 - 13 April 2018

The contributions received from members of the group throughout the process, as well as the progress reports of the individual meetings can be found on the EG-ITRs website at: <http://www.itu.int/en/council/eg-itrs/Pages/default.aspx>

1. **Review of the 2012 ITRs, taking into account new trends in telecommunications/ICT, emerging issues and obstacles that may arise from the implementation of the 2012 ITRs and WCIT-12 Resolutions and Recommendations**

**2.1 Applicability**

**2.1.1** Some general views were expressed on the applicability of the 2012 ITRs.

1. A member stated that the applicability of the 2012 ITRs should be understood in terms of the advantages derived from fulfilling the legal obligations thereof vis-à-vis other binding multilateral and/or international instruments. In general terms, this refers to the degree/level to which the provisions of the 2012 ITRs have been implemented in binding international instruments and national legal frameworks.
2. Concerning the scope of applicability, a view was expressed that along with the rapid development of technologies, international telecommunication markets and operators’ providing services which respond to markets’ need are also ever-changing, and in order to accommodate this rapidly evolving international telecommunication environment, the ITRs should be flexible and future-proof which could be applied in the future. As described in WCIT-12 Resolution 4, the ITRs should be “*high-level guiding principles*” and should not stipulate details as detailed operational matters, matters which need to be updated frequently, matters which impose undue and unnecessary burden on operators etc. These should be excluded from the ITRs and delegated to operators, or would be defined in non-binding documents such as recommendation or guideline only when it is absolutely necessary and agreed among ITU members.
3. A member stated a view that each of the 193 ITU Member States faces unique regulatory challenges depending on context, the level of technical/economic development of each national market, and the need for intervention/regulation in each country. The ITRs are not effective to solve problems that have a limited scope and affect only some countries. In the member’s view, the ITRs should determine common rules to manage the interdependence among all nations in the provision of telecommunication/ICTs, and should reflect the following three commitments by signatories: (1) to strengthen national-level management of cross-border spillovers (e.g., ICT-related intellectual property rights infringements); (2) to protect any state’s sovereignty if it comes under attack (e.g., cyber-security threats); (3) to cooperate in mitigating global system risks (e.g., failure of communications infrastructure). The member with this view also noted that for the ITRs to be applicable, Member States should be willing to commit to these three objectives of international cooperation.

**2.1.2** Two sets of divergent views were expressed by members on the applicability of the 2012 ITRs in a rapidly evolving international telecommunication environment.

**2.1.2.1.** Proponents of the first set of views expressed the following:

1. Some members expressed the view that operators are no longer using the ITRs or using it in a very limited manner, as they operate under commercial agreements.
2. These members noted that when the ITRs were adopted in 1988 most telecommunications operators were state-owned enterprises and an international treaty was necessary to give private telecommunications carriers a baseline global framework that ensured interoperability and guaranteed revenue flow. Also, in a monopoly era, the absence of such regulations in an environment dominated by monopoly providers with market power could have resulted in poor interconnection, higher settlement charges, and poor quality of service.
3. They highlighted that in the last two decades, international and domestic telecommunication markets have experienced extraordinary structural and technological changes. They were of the view that the monopoly environment has disappeared in the vast majority of countries, with the emergence of multiple competing private-sector operators in each country resulting in a competitive landscape. The presence of competition in a majority of countries means that most international telecommunication traffic is exchanged and terminated via competitive interconnection agreements, rather than through mutual agreements established through the ITRs framework. They believe that flexibility is indispensable for developing competitive business and promoting innovation in this rapidly changing international communications market.
4. The members with this view further stated that the ITRs are effectively irrelevant to international telecommunications traffic as the volume of such traffic being settled outside the accounting rate system increasingly dwarfs, and eventually will replace completely, the traffic being settled under that system. They noted that according to their knowledge, there are very few countries that continue to rely on the ITR-based accounting rate regime, and such traffic accounts only for less than 1% of global traffic flows (with some more examples cited in the corresponding contributions).
5. It was indicated that the ITU Constitution and Convention already contain provisions on cooperation in the provision of international telecommunication services.
6. They were of the view that the successful deployment and use of telecommunication services and applications worldwide, as reflected and evidenced in several international telecommunication reports and publications, including those of the ITU, has not been the result of the ITRs, and that what has been and will continue to be a successful path for the deployment, adoption and use of telecommunications and ICTs in a rapidly evolving telecommunications sector, is the creation and enhancement of regulatory environments that promote competition, investment, transparency, entrepreneurship and innovation.

**2.1.2.2.** Proponents of the second set of views expressed the following:

1. Some members expressed the view that as one of the key instruments of the Union, the ITRs should be frequently reviewed by the affected parties and the ITU. The review should examine the applicability of the ITRs in the short, medium, and long term.
2. Some members were of the view that ICTs now underpin everything we do, therefore an up to date Treaty-level provisions are required for ensuring a connected world in a secure, safe and affordable manner and those international services are offered fairly and efficiently. The convergence of technologies, and the appearance of new ones, has changed the landscape dramatically and the ITRs must be reviewed to reflect this.
3. Some members expressed the view that that the assumption of competitive international market may not necessarily hold true globally. They highlighted that there are players who are still dominant at the international level, and there is a need for some regulations to deal with this at the international level.
4. Some were of the view that some items in the ITRs continue to be of current relevance within the international telecommunication sector environment, in so far as they promote regulatory consistency and generate trust in international telecommunications. They include:
* The security and robustness of international telecommunication networks as an individual and collective obligation for Member States, which must pursue the harmonious development of international telecommunication services offered to the public.
* Promotion of investment in international telecommunication networks.
* The establishment of provisions to ensure international calling line identification.
* The appropriate use of numbering resources.
* The creation of enabling environments for the implementation of regional telecommunication traffic exchange points.

A member with this view also noted that these current provisions of the ITRs are complemented by the present environment in which telecommunication markets have transited to scenarios under which authorized operating agencies have bilateral agreements and competition is constantly increasing, generating lower prices and increased access to telecommunication services.

1. Some members expressed the view that operators feel the need for more coordination with their counterparts in other countries and intergovernmental coordination on issues concerning, for example:
* charging and accounting aspects,
* network security,
* unsolicited messages,
* dual taxation,
* offsetting,
* settlements for maritime communications
* State regulation impacting business models.
1. An operator noted that certainty, predictability and uniform application of international rules governing commercial activities are crucial in creating a favourable investment environment necessary to expand connectivity to everyone.
	* 1. **Views on holding a new World Conference on International Telecommunications (WCIT)**

While recognizing that the task of Expert Group is to undertake a review of the 2012 ITRs, and not to develop a new set of ITRs or propose a new WCIT, several views were expressed by members concerning the convening of a new WCIT:

1. Some members expressed the view that a new WCIT to revise the 2012 ITRs should not be held because, as finding global consensus would be extremely difficult, and perhaps impossible. It could probably generate greater disagreement between participants and produce results that would do little to encourage the signing of the new text.
2. Some members were of the view that another WCIT would cause significant uncertainty, which might hold back investment and development.
3. Some members highlighted the potential reputational risk for the ITU in holding a new WCIT.
4. Some members noted that the financial and opportunity cost of convening a WCIT is considerable.
5. Some members suggested instead to focus resources on implementing the 2030 Sustainable Development Agenda and fostering new investment and affordable telecommunications, particularly in developing countries.
6. It was noted that until a unified consensus position regarding the applicability and effectiveness of the Regulations is reached, holding a new WCIT will not achieve the success expected.
7. A member expressed the view that that a new WCIT should only be held if its outcomes produce concrete results in the telecommunication/ICT market that compensate for the financial and opportunity costs of holding a new WCIT.

**2.2 Legal Analyses**

**2.2.1** While noting that legal analyses can deal with various different aspects, some members considered that the concept in hand entails that the legal analyses of the 2012 ITRs must focus on confirming that each provision thereof complies with the Purpose of the Regulations as established in Article 1. In this regard a member expressed the concern some of the provisions are outside the stated purpose and scope of the ITRs as articulated in Article 1 of both the 1988 and 2012 ITRs.

**2.2.2** Some members highlighted certain elements included in the 2012 ITRs that they consider important e.g. custody of international telecommunication numbering resources, international calling line identification (CLI) etc. In this regard, a member expressed the view that a periodic review of the ITRs should be considered, to ensure that they are adapted to society’s new needs in the field of telecommunications, such as: new trends in telephony (VoIP, IP telephony), Over the Top (OTT) services, the Internet of Things (IoT), and others.

**2.2.3** A member considered that, unlike the existing international legal instruments such as treaties on free trade, which do not always cover current issues and trends in the telecommunication sector, the ITRs have greater scope in that they recognize the importance of international standards for the global compatibility and interoperability of telecommunication networks and services and undertake to promote such standards through the work of competent international organizations including the ITU. Moreover, unlike other international instruments, the ITRs include provisions on safety-of-life with respect to distress telecommunications, security and robustness of networks, suspension of services, e-waste and accessibility matters. On the other hand, taking into consideration the WTO Agreement on Technical Barriers to Trade, and in particular Article 2, § 2.2, thereof, it is noted that the ITRs provide necessary regulatory elements and principles that do not affect trade and promote the removal of technical barriers to it.

**2.2.4** An operator was of the view that inconsistent application of ITRs results in specific and tangible detrimental effects to operating agencies. As an example, the operator stated that a number of countries, in which they operate, do not apply Article 8.3 of ITRs 2012 and Article 6.12 of ITRs 1988 despite their international commitments to do so.

**2.3 Potential Conflicts**

**2.3.1** Some members were of the view that they do not foresee any potential legal conflicts between the 1988 and the 2012 ITRs.

They further referred to the explanatory text provided on the ITU website with regard to the applicability of the two version of the Treaties (cited below), which they see as a guideline for future implementation:

*“The 2012 treaty replaces the 1988 treaty for the parties to the 2012 treaty. Non-parties to the 2012 treaty remain bound by the 1988 treaty. Relations between a non-party to the 2012 treaty and a party to the 2012 treaty are governed by the 1988 treaty. It has to be noted that for those signatories of the 2012 treaty, the latter shall apply provisionally as from 1 January 2015.”*

With respect to whether there will be any practical conflicts arising from the fact that the 1988 ITRs will apply in some relations between ITU Member States and the 2012 version in others, those with this view noted that it may be too early to make such a judgment as the 2012 ITRs only entered into force two years ago (January 1, 2015) for its earliest adopters. They further expressed the view that even if some significant difficulties were discovered, however, it would be important to take into account their scale and scope and their impact on cross-border services.

**2.3.2** Some members were of the view that only some countries being signatories to the 2012 ITRs as opposed to the 1988 ITRs could result into conflicts and limitations in terms of the implementation of the ITRs. They noted that application of 1988 ITRs is limited by the fact of obsolete understanding of the object and subjects of the Regulations, and application of 2012 ITRs is limited by the small number of acceded countries. They therefore are of the view that simultaneous application of both 1988 ITRs and 2012 ITRs provisions is not possible.

They particularly highlighted certain provisions of the 2012 ITRs which do not form part of the 1988 ITRs, such as the provisions on accessibility, reduction of e-waste, cooperation in combating unsolicited bulk electronic communications etc., and could therefore appear as problematic in their implementation between different Member States, also posing challenges for telecommunication operators.

1. **Summary**

**3.1**There are two divergent points of view on the applicability of the 2012 ITRs:

1. Some members expressed the view that with the extraordinary structural and technological changes international and domestic telecommunication markets resulting in competitive markets in a majority of countries, the ITRs are no longer relevant, and that operators are not using the ITRs or using it in a very limited manner as they operate under commercial agreements.
2. Some members expressed the view that ITRs continue to be of current relevance within the international telecommunication sector environment, as they promote regulatory consistency, facilitate coordination on issues beyond commercial agreements, and generate trust in international telecommunications.

**3.2** Legal analyses of the 2012 ITRs can deal with various different aspects. These include for example, confirming that each provision thereof complies with the Purpose of the Regulations as established in Article 1; the importance of an international legal instrument such as the ITRs for the global compatibility and interoperability of telecommunication networks and services when compared with other existing international instruments such as treaties on free trade; or the potential impact of the inconsistent application of ITRs.

**3.3** There are two divergent points of view about the possible legal conflicts between the 1988 and 2012 ITRs:

 a. Some members were of the view that they do not foresee any potential legal conflicts between the 1988 and the 2012 ITRs.

 b. Other members are of the view that simultaneous application of both 1988 ITRs and 2012 ITRs provisions is not possible.