



**Proposals to ITU CWG-Internet open consultations on  
"Public Policy considerations for OTTs"  
September, 2017**

In accordance with the decision of the ITU Council session, the Council Working Group on international Internet-related public policy issues is holding an open consultation on Public Policy considerations for OTTs.

**Summary**

Global cross-border nature of OTT services leads to a situation when services are provided in a certain country or region, but the legislation of this country is not necessarily fulfilled. Thus, a secure and efficient environment for OTT services cannot be formed exclusively by OTT providers or by regulatory authorities governed by jurisdiction of one country. Such environment should be established via a coordinated approach of all stakeholders internationally. At the same time, provision of OTT services shall meet the regulations of country where they are provided. The Internet governance in general and OTT services in particular should not be conditioned by unilateral political restrictions or commercial interest.

Lack of efficient regulation and self-regulation of OTTs demands settlement of a discussion platform where all these issues could be put forward and solved. States and civil society should take the responsibility to stimulate creation of a competitive environment and possibility for consumers to choose both the OTT service and the terms of its use. The set of such policies should also include requirements against possible anticompetitive behavior and abuse of market dominance.

Below we would like to share information on the proposed theme related to activities of OTT providers and other players and to the questions put forward in this open consultation.

***1. What are the opportunities and implications associated with OTT?***

OTT services affect considerably national and international telecommunications and offer to the end-users a wide range of innovative services or well-known traditional voice and data transmission services based on new technologies. The users get services they are accustomed with which have the same quality and functionality, or even wider functionality, in a more convenient way, cheaper, or in many cases even for free.

To take a look at OTT services development in Russia, audience of messengers at the end of 2016 amounted around 101 million people, while in 2017 according to the Russian Ministry of Telecom and Mass Communications the number of active subscribers of mobile operators using traditional voice services amounted more than 104 million people<sup>1</sup>, and Internet audience achieved 87 million (source: Mediascope, beginning of 2017), reaching 71% of all population of the country.

The most popular messengers are WhatsApp, Viber, VKontakte, Skype, Telegram (according to J'son & Partners Consulting survey, end 2016). WhatsApp in Russia is used by more than 30 million people, the number of Viber registered users accounts to 76 million people (increased by 43% in 2016 compared to 2015). The number of active Telegram users achieved 6 million people<sup>2</sup> in 2016.

OTT audiovisual services market is also actively developing: total audience of Russian online video services is assessed as 38–40 million people. The most visited online cinemas are Ivi.ru, Megogo, Amediateka, TVzavr. According to expert evaluations, Russian OTT video service market in 2016 has shown growth by 40%, and by 2021 market volume will increase more than 3 times<sup>3</sup>.

Significant development of OTT services brings new challenges for traditional telecom operators due to active migration of users to digital technologies and increased popularity of OTT services. For example, during 1st quarter 2017 mobile Internet traffic in Russia reached 1.36 billion gigabytes, that is 85% more than during the same period of the previous year.

Summarizing the above, we can note as outcomes of OTT service development and growth on the Russian market the following aspects:

- The users of OTT service get user-friendly, affordable, mobile services – both traditional telecommunication and innovative;
- Businesses use the OTT services as a flexible tool for communication with clients or building own business processes to improve business activity;
- OTT services continue to grow actively as they work based on the innovative and progressive technological platforms and business models and experience minimal normative and legal restrictions;
- Due to concurrent environment the traditional telecom operators strive to enhance interaction models with their subscribers offering new services and business approaches, however all the obligations established by the legislation in the form of license requirements, taxation and so on are retained.
- Development of OTT services stimulates competition on the market.

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<sup>1</sup> <http://minsvyaz.ru/uploaded/files/abonentyi-shpd-0317.xlsx>

<sup>2</sup> [http://www.rbc.ru/technology\\_and\\_media/06/03/2017/58b99c419a79473e6841bfbdb](http://www.rbc.ru/technology_and_media/06/03/2017/58b99c419a79473e6841bfbdb)

<sup>3</sup> <http://tmt-consulting.ru/wp-content/uploads/2017/08/%D0%A2%D0%9C%D0%A2-%D1%80%D0%B5%D0%B9%D1%82%D0%B8%D0%BD%D0%B3-%D0%9E%D0%A2%D0%A2-%D0%B2%D0%B8%D0%B4%D0%B5%D0%BE%D1%81%D0%B5%D1%80%D0%B2%D0%B8%D1%81%D1%8B-2016.pdf>

## 2. *What are the policy and regulatory matters associated with OTT??*

Widespread use of OTT services and their considerable impact on the economy require regulation of OTT services in order to establish an enabling environment to promote telecommunication/ICT market development and to protect interests of OTT service consumers as well as of States. Paradigm of service provision to the user, as well as business models are changing – that is being the reason to approach OTT regulation issues in a systematic manner. Both OTT providers and regulatory authorities in various countries are looking for applicable and adequate approaches. Many notions are not defined yet, there is no clear vision what should be the basis for OTT regulation and to what extent the national legislation could be harmonized on the international level. We can highlight the following challenges for OTT services regulation:

- applicability of traditional telecoms regulation of OTTs and possibility to apply it to new services, in principal;
- development of new or amendment of existing regulatory requirements which refer to similar services, offered by incumbent telecom operators and OTT providers (observing the principle of the competitive neutrality) aiming to create equal requirements for provision of similar services, regardless of the technological platform of realization;
- definition of the necessary and sufficient level of OTT service regulation to ensure the protection of user' interests, competition, and taking into account the interests of national security (regulation can be implemented in various forms, such as licensing, requirements for authorization of users, personal data protection, etc.);
- necessity to establish legal norms that would ensure equal opportunities for the development and operation of national and global OTT services.

We can also highlight the following practical issues that are on the agenda of regulatory authorities:

- identification of an overall and acceptable by all interested parties definition of OTT services;
- identification of measures and implementation mechanisms, required to protect users' rights, because new technological characteristics of OTT services create a new functional environment for these services (involvement of a large number of companies in service value chain, end-to-end encryption, trans-border character of services and provision of services in different jurisdictions), and makes it more difficult to comply with requirements related to security, countering the unlawful use, etc.;
- consumer rights protection (for instance referring to terms of service that establish the jurisdiction of another country for dispute settlement):
  - the terms and conditions of Skype usage are regulated a with the laws of Luxembourg;

- Viber service is regulated and managed in accordance with the laws of Luxembourg;
- WhatsApp and Telegram service is regulated by Californian legislation;
  - quality of service and workability of setting requirements on quality of service, as well as possibility for OTT providers to comply with these requirements, considering that OTT providers do not control the entire value chain of service provision;
  - measures to protect State interests (interaction during criminal investigations, legal interception) and countering the unlawful use of service;
  - ensuring emergency calls according to regulatory requirements, including related to quality and determining location of the customer.

### ***3. How do the OTT players and other stakeholders offering app services contribute in aspects related to security, safety and privacy of the consumer?***

Market players – OTT providers, regulatory authorities, business entities (that use OTTs as tool to build own services or business processes), civil society contribute within their area of responsibility and according to their own understanding need of such contribution.

One of the basic requirements for participants of the OTT service market is to comply with the national legislation related to security, protection of personal data, privacy of consumers. Facing this challenge, some OTT players are not prepared to comply with these requirements due to technological, organizational or policy-related reasons. That is why the development of OTT regulation taking into consideration requirements and interests of all stakeholders is an important task. Many countries deal with this task, including Russian Federation. Having in mind the trans-border character of OTT services this task should also be dealt with on the international level.

Referring to aspects related to security and personal data and privacy protection, it should be noted that currently, the legal regulation related to the protection of personal data is implemented through:

- Federal Law No. 152-FZ<sup>4</sup> of July 27, 2006 "On Personal Data" which defines basic concepts, principles and conditions for the processing of personal data, establishes legislative norms concerning measures for security of personal data processing, rights and obligations of the personal data operator, interrelations between the operator and personal data subject, cross-border transfer of personal data;

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- Federal Law No. 149-FZ <sup>5</sup> of July 27, 2006 "On Information, Information Technologies and Information Protection" describes terms and definitions in the field of information technology, establishes the principles of legal regulation of relations in the field of information, information technologies and information protection, and regulates relations which affect the right to search, receive, transfer, produce and disseminate information, using information technologies.

Norms concerning the operation of OTT services including foreign services, are introduced by Federal Law No. 242-FZ <sup>6</sup> of July 21, 2014 "On Amending Certain Legislative Acts of the Russian Federation Updating the Procedure for Processing of Personal Data in Information and Telecommunication Networks" which is effective from September 1, 2015. The law establishes the duty of operators to record, systematize, accumulate, store, clarify (update, modify), retrieve personal data of the Russian Federation citizens using databases located on the territory of the Russian Federation.

Specific aspects of messenger operation are identified by the Federal Law No. 241-FZ of July 29, 2017<sup>7</sup> on Amending Articles 10.1 and 15.4 of the Federal Law on Information, Information Technologies and Protection of Information (concerning obligations of the organizer of information dissemination through the network)" (enters into force from January 1, 2018). According to the Law the provider of instant messaging services (messenger) shall identify Internet users, to whom it provides services for electronic messaging. User identification is performed using subscriber's number, on a basis of identification contract between the messenger and operator. Moreover, it is specified, that messengers, which are Russian legal entities or Russian citizens, can identify users by their subscriber number without concluding contracts.

Along with the duty to perform identification, messengers shall provide users with the technical capability to refuse receiving electronic messages from other users, allow sending electronic messages on the request of government bodies, and also restrict messages containing information distributed with violation of the requirements of the Russian federation law.

OTT providers are also implementing measures to ensure security and protection of user data, however they are guided primarily by their business priorities, so they interpret the concept of personal data protection according to

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<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102108264&intelsearch=%CE%E1+%E8%ED%F4%EE%F0%EC%E0%F6%E8%E8%2C+%E8%ED%F4%EE%F0%EC%E0%F6%E8%EE%ED%ED%FB%F5+%F2%E5%F5%ED%EE%EB%EE%E3%E8%FF%F5+%E8+%E7%E0%F9%E8%F2%E5+%E8%ED%F4%EE%F0%EC%E0%F6%E8%E8>

<sup>6</sup> <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102355893&intelsearch=%EE%F2+21.07.2014+%B9+242-%D4%C7>

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<http://pravo.gov.ru/proxy/ips/?docbody=&nd=102439977&intelsearch=%EE%F2+29+%E8%FE%EB%FF+2017+%E3%EE%E4%E0+%B9241-%D4%C7+>

their interests. In some cases, OTT providers do not take upon themselves the specific responsibilities to protect users' personal data, and process personal data to study user preferences in order to provide him or her more personalized information or to improve the service functionality.

Another issue is the authentication of users in messaging systems, social networks and in a number of other services, since gaps in authentication systems allow using OTT services for illegal actions.

Global cross-border nature of OTT services leads to a situation when services are provided in a certain country or region, but the legislation of this country is not necessarily fulfilled.

Thus, secure and efficient environment for OTT services cannot be formed exclusively by OTT providers or by regulatory authorities governed by jurisdiction of one country. Such environment should be established via a coordinated approach of all stakeholders on international scale. At the same time, provision of OTT services shall meet the regulations of country where they are provided. The governance of the Internet in general and functioning of OTT services in particular should not be conditioned by unilateral political restrictions or solely commercial interests.

Thus the lack of efficient regulation and self-regulation of OTTs demands settlement of a discussion platform where all these issues could be put forward and solved. This would allow harmonizing national and international norms and standards, to collaborate in a coordinated manner at all governance levels taking into account the rights of all states to govern their national Internet segments. And all stakeholders would take part in equal international cooperation related to OTT regulations.

#### ***4. What approaches might be considered regarding OTT to help the creation of environment in which all stakeholders are able to prosper and thrive?***

Currently, many countries of the world are developing a legislative framework and regulatory practice of various aspects of OTT services, related to:

- protection of personal data and privacy,
- authentication,
- regulation of audiovisual services.

Firstly, such practice creates new challenges for providers of OTT services, as they have to comply their services with the legislative requirements in different countries. It results in additional costs and continuous monitoring of changes in norms and requirements in different countries. Secondly, the regulation at the national level of cross-border services, including OTT services, is often times inefficient and does not improve the quality of services for the consumer or the security of service. In this regard, there is a need to coordinate efforts to develop and put in place regulatory burden on OTT services in various countries and reasonably minimize such burden.

Finally, considering that in most cases OTT provider is based in one country, while providing services in many other countries, we should note, that a single country or a group of countries should not impede the Internet functioning or the provision of OTT services, nor should it establish norms and rules for OTTs at its sole discretion, use mass surveillance by means of OTTs, or destabilize situation in sovereign States.

Regulatory approaches shall also encourage opportunities for technological and economic interaction between incumbent operators and OTT providers. In this context, we can highlight the following approaches:

- network neutrality,
- creation of similar regulatory requirements for competing services, both for incumbent telecom operators and for OTT service providers (compliance with the principle of competitive neutrality).

In this context, a further study is required, including the study within the ITU, on the applicability and feasibility of OTT service licensing, and on the establishment of equal competitively neutral environment for the provision of the same type of services.

In addition, we should take into account the fact that a number of OTT providers are large companies with dominant market share, and it is necessary to develop an appropriate set of policies to revitalize the market competitive environment that might be affected by the abuse from global OTT players. A dangerous concentration of the global share of OTT services with one or two OTT players should be avoided. States and civil society should take the responsibility to stimulate creation of a competitive environment and possibility for consumers to choose both the OTT service and the terms of its use. The set of such policies should also include requirements against possible anticompetitive behavior and abuse of market dominance.