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RESPONSE TO  
ITU CWG-INTERNET  
OPEN CONSULTATION ON  
PUBLIC POLICY CONSIDERATIONS FOR OTTS

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**Re: Open consultation on Public Policy Considerations for OTTs**

Digicel welcomes the opportunity to respond to the ITU's Council Working Group - Internet Open Consultation on Public Policy Considerations for OTTs.

From our launch in Jamaica 2001, Digicel has expanded rapidly and now spans across 31 markets in the Caribbean, Central America and Asia Pacific. In each market - our mission is to deliver the best network, the best service and the best value to our customers and to give back to our communities.

Today, Digicel is proud to serve consumers and business customers alike and to offer the worlds of mobile communications, business solutions, media and entertainment. We have invested over US \$5 billion in the Digicel business worldwide directly into the countries in which we operate and continue to invest to bring leading edge technologies to customers in these markets.

Digicel also runs a host of community-based initiatives across its markets, including Digicel Foundations in Haiti, Jamaica, Papua New Guinea and Trinidad and Tobago which focus on educational, cultural and social development programs directly in the community.

## 1. Introduction

How policy makers and regulators address the challenge of OTTs will be very important in shaping the future and the future of many developing countries and their people.

The “unregulated” nature of internet has been credited with much of the innovation that has happened. While some of the original Internet start-ups were founded by ‘a couple of guys working out of a garage’ these days are long gone and today the Internet and the digital age its supports are now dominated by a handful of giant corporations.

The Internet Giants still argue that they should be exempt from regulation – they believe they wear a ‘Cloak of Regulatory Invisibility’: on the basis that any attempt to regulate them will stifle their innovation and creativity. According to this argument they should be exempted from the laws and rules that apply to everyone else.

However many of the Internet Giants have also proven that they cannot be left unsupervised. In the last year we have seen some of the Internet Giants incur massive fines from anti-trust authorities and reports of OTTs flouting local regulations and abusing private data are now commonplace.<sup>1</sup>

More widely, the Internet has also facilitated unbridled levels of cyberattacks on government services, monetary extortion, cyber bullying, personal trolling, fake news, interference in the democratic electoral process and unprecedented hate speech and racism.

The public policy imperatives that gave rise to regulation, be it taxation, consumer protection, privacy, or licensing of services remain as valid as they did previously whether or not the service is delivered over the internet.

Around the world it is increasingly accepted among policy makers that law and regulation does – and must - apply to the online world and that OTTs should be made subject to existing regulation in the economy and also that new rules may be required to properly regulate the emerging digital economy. A summary of developments around the world to date includes:

- A number of countries have introduced measures in relation to tax and VAT on digital services – Colombia being a recent example this year;<sup>2</sup>

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<sup>1</sup> See for example: ‘EU fines Google record \$2.7 billion in first antitrust case, Reuters June 27, 2017; ‘Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover’, European Commission Press Release 18 May 2017; ‘Online platforms and the digital single market’, House of Lords Select Committee on European Union, 20 April 2016.

<sup>2</sup> <https://www.ovum.com/colombia-goes-after-otts-with-new-tax-laws/>.

- France and Germany have recently called on tax laws to be changed to ensure that Airbnb and other platforms pay their fair share of taxes;<sup>3</sup>
- The EU is revising its electronic communications regulation to provide a more level playing field;
- Many countries have licensing requirements for OTTs - France, Belgium, Germany, Singapore and Australia being examples;
- Uber has been declared a transport service by the Advocate General of the European Court and therefore should be subject to certain transport regulations.<sup>4</sup> In Ireland the National Transport Authority considers that Uber would provide unfair competition to licensed taxis and stated that "operating parallel regulated and non-regulated regimes would undermine the regulated transport system".<sup>5</sup>
- Airbnb is grappling with local regulations in many cities and countries around the world;<sup>6</sup>
- Legal interception – it is now widely accepted that the electronic communications of criminals, terrorists and drug cartels communications should not be outside of the reach of the police, and there are moves in many countries to address this.
- Many jurisdictions are proposing regulation of harmful content including Germany, Ireland, the UK, and the EU;
- The EU is also proposing to protect locally produced content by requiring that 30% of VOD content be European content and that VODs contribute to the cost of the production of such content;<sup>7</sup>
- In the UK the Government announced that it wishes to make the UK the world leader in regulating use of data and proposing that same rules apply to online and offline content.<sup>8</sup> The concept of an Internet levy similar to the existing levy on the gaming industry has also been proposed.

For developing economies policy choices and regulations are very important tools that can ensure that they do not get left behind while the developed digitised economies accelerate away with all of the Internet companies and high skilled jobs.

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<sup>3</sup> <https://www.theguardian.com/business/2017/aug/10/airbnb-faces-eu-clampdown-fair-share-tax>

<sup>4</sup> Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain, SL.

<sup>5</sup> <http://www.independent.ie/business/irish/major-setback-for-uber-in-ireland-as-lobbying-efforts-for-tech-firms-expansion-hit-roadblock-35976744.html>.

<sup>6</sup> <https://www.cnbc.com/2017/04/13/airbnb-growth-slowing-regulation-ubs.html>.

<sup>7</sup> <https://www.euractiv.com/section/digital/news/council-backs-30-european-content-threshold-for-audiovisual-platforms/>.

<sup>8</sup> <http://www.independent.co.uk/life-style/gadgets-and-tech/news/theresa-may-internet-conservatives-government-a7744176.html>.

In spite of the global nature of the internet the major economic benefit from the online economy is concentrated in the major technology hubs such as Silicon Valley. This is global displacement - the direct benefit of the digital age moves economic benefit from the developing nations to technology hubs in developed nations.

It is far from certain that developing economies will be able to emulate the success of these technology hubs as they do not benefit from the same economies of scale and do not benefit from the network effects and synergies of having the skillsets and financial and investment resources at the same location.

The World Bank projects that two thirds of jobs in developing economies face being automated out of existence.<sup>9</sup> A possible, and perhaps likely, future for developing economies is one where local industries are displaced and most services are provided by OTTs based abroad. The revenues from these industries are sucked abroad from the local economy by OTTs that contribute nothing locally in terms of taxation, employment or investment and do not obey the law or local regulations.<sup>10</sup>

Smaller developing economies are much more vulnerable to the shift to digital. They are more dependent on a few key sectors such as telecoms, tourism and retail and going forward even their current growth sectors such as Business Process Outsourcing (BPO) centres will be replaced by Artificial Intelligence (AI). In order to support developing nations there is an urgent need to strengthen their frameworks in order to protect their economies and the time to act is now.

## **2. Reduced tax base and taxation revenues**

The telecommunications sector has been one of the first sectors to be ‘disrupted’ by rise of the Internet Giants and the OTTs. In many developing countries revenues of telecommunications operators have declined and the corresponding tax take for governments has also declined. Typically the Internet Giants and OTTs are not registered for, and do not pay, taxes locally and Governments do not gain additional taxation revenues from these businesses as the contribution from local businesses declines.

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<sup>9</sup> <http://documents.worldbank.org/curated/en/896971468194972881/pdf/102725-PUB-Replacement-PUBLIC.pdf>.

<sup>10</sup> See ‘Tech waits for no man’, Kevin Maney, Newsweek, June 17, 2016.

As the Internet Giants and OTTs expand to provide other services the taxation revenue generated by these sectors can also be expected to decline. In the face of these declines Governments still need to find a way to pay for roads, health, education and other public services.

The question as to how OTTs and the Internet Giants pay their fair share of taxation to local economies is now an important global discussion. Unless and until this question is resolved the OTTs and Internet Giants will enjoy a favourable operating environment but this will be to the detriment of national Governments, local populations and other stakeholders.

### **3. Investment in internet infrastructure**

Another very significant problem is the digital divide is not being closed. The ITU's figures for 2016 show that the percentage of individuals accessing the internet in developed countries was over 81% while it was just under half of this figure in developing countries.<sup>11</sup> The problem goes beyond access as broadband speeds in developed countries are many multiples of those in developing countries.

Huge amounts of capital investment is needed in broadband networks of developing nations. Drones, balloons and other flights of fancy will not deliver the connectivity required and do not solve the key problem of how to fund the investment required.

The question is who will pay for the investment needed to close the gap? The Internet Giants have indulged in vanity projects which will not materially close the gap but at the same time seem reluctant to make the significant investments required to actually bridge the digital divide.

At present the OTTs and Internet Giants pay nothing to use the networks over which they provide their services. Most certainly there is deep resistance among the Internet Giants and OTTs to the concept of sharing revenues generated over the Internet or contributing to the cost of the networks they use.

However this position is not sustainable and neither is the oft repeated mantra by OTTs that network operators should simply change their business model. On the contrary it is the OTTs that must also change their business model and accept that all network providers – whether they are telecoms operators or anyone else – need to be given a revenue contribution so they can fund broadband networks.

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<sup>11</sup> 'The State of Broadband: Broadband Catalyzing Sustainable Development', Broadband Commission for Sustainable Development, September 2016, p46.

Equitable commercial arrangements and revenue sharing between OTTs and network providers is an imperative for developing regions and developed regions and it is important that legal and regulatory frameworks permit and promote these outcomes.

## 4. Unfair Competition

Another challenge is what jobs and opportunities will be there for the people of developing nations? Today local service providers are subject to regulation and compete with overseas OTTs that are not. This is unfair and puts local businesses at a disadvantage – be they telecommunications providers or other industries such as retail, local entertainment, tourism, transportation, e-services etc.

How can it be ensured that these globalized services are competing fairly with the locally regulated services? If these services cannot be addressed today what confidence can have that that other regulated services such as lawyers, accountants, banking or healthcare can be addressed when they also face digital competition?

We have seen where the on-line platforms pre-emptively use technology to make regulation impossible. For example before policy makers could act to apply have lawful intercept obligations on them the OTT providers introduced end-to-end encryption making any such obligation impossible to enforce. The fact that the OTT providers are willing and able to supplant sovereign governments by foreclosing public policy options should be a significant concern for the ITU and an incentive for prompt and effective action

## 5. Conclusion

The OTTs and Internet Giants continue to argue that the law should not apply to them. As recently as May this year the Internet Association wrote to the USTR (the US Trade Representative) to oppose what they called “anti-Internet laws” and calling for Governments to protect their “current business models”.<sup>12</sup>

It is clear that the Internet Giants still wish to keep wearing their cloak of regulatory invisibility and still believe that this is a valid proposition.

However, these “current business models” are really a form of extraction industry. They mine local markets for data and then use this to sell services – taking the revenues out of the country without

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<sup>12</sup> Internet Association letter to Ambassador Lighthizer United States Trade Representative, May 16 2017.

paying any tax, making any local investment or obeying local laws or developing any human capital. They are plundering the assets of countries and putting nothing back. Thousands of jobs will be lost in economies where ICT in education and broadband infrastructure is already in need of huge investment.

Laws and regulations exist for good public policy reasons which are valid irrespective of whether the delivery method is online or offline. It is imperative that regulators and governments close the loopholes that allow the new global corporations to use the Internet to avoid regulation.

The shape of what a future framework that addresses the challenge of OTTs might look like is now coming together around the globe and the key elements may be summarized as follows:

- A level playing field where local service providers are not subject to rules that do not apply to online competitors and the application of the same rules to local and online providers – including the licensing of service providers (“Same service same rules”);
- Internet Giants and OTTs must make a local contribution - pay some form of local taxation or levies where services are provided and from where data is extracted;
- The protection of consumer data and of consumer rights in general;
- The regulation of harmful content;
- Protection of the public interest and national security - in particular an obligation on OTTs to cooperate with police and security forces;
- The development and enforcement of antitrust policies and powers adequate to address the challenge of the Internet Giants/OTTs;
- Equitable commercial arrangements and revenue sharing between OTTs and local network operators.