

**Yahoo! JAPAN's Contribution to the CWG-Internet Online Open
Consultation (June-September 2017)
[August 18, 2017]**

Public Policy Considerations for OTTs

Considering the rapid development of information and communications technology (ICT) which led to the advent of Internet-based services commonly known as "over-the-top" (hereafter: "OTT"), Yahoo Japan Corporation (hereafter: "Yahoo! JAPAN") takes this opportunity to submit its inputs on the following key aspects from policy perspective.

Summary

- ITU is not an appropriate venue to discuss public policy considerations for OTTs. The role of ITU is to provide a venue to discuss standards for the global stability of communication at network level and therefore is "not" a venue to address such fields as a content layer in which each country sets its own rules.
- It is premature to think about the policy and regulatory matters associated with OTT since there are a huge number of elements for considering the policy and regulatory matters associated with OTT and there is no sufficient evidence to be able to do that.
- It is far more premature to start to discuss an international legal framework on this matter and this kind of argument seems to be based on the assumption of fact without sufficient evidence.
- While the free flow of data at a network layer is indispensable and must be guaranteed both domestically and internationally, necessary and reasonable measures at the content layer should be allowed at domestic level to protect legitimate interests for multistakeholders based on social and cultural backgrounds.
- In principle, self-regulation by OTTs should be respected and regulations should not be set or at least be kept to a minimum.
- Each international organization should deal with each relevant "aspect" of Internet-related public policy only while respecting the mandates of other international organizations, and Internet-related public policy discussion should take place at a venue where all stakeholders can participate on equal footing.

Question 1:

What are the opportunities and implications associated with OTT?

Although there is no widely accepted definition of OTT, it is said to be any Internet application that “may” substitute or supplement traditional telecommunication services, from voice calls and text messaging to video and broadcast services¹. There are several kinds of OTTs as you can see below, and OTTs are said to create new service models, increase employment opportunities and entrepreneurs, promote innovation, and contribute to economic growth in both developing and developed countries, from all of which consumers enjoy various benefits. Since a market is vitalized and competition is promoted based on these positive effects, more affordable services can be provided and then further innovation and new services can be materialized.



(Source: ottsource.com/ott-blog)

It is often said that OTTs are at an unfair advantage comparing with traditional network operators in that they do not share in the cost of the infrastructure that carries OTT traffic. However, as Mr. Ahmed Said, a leader of ITU-T Study Group 3 (SG3) Rapporteur Group on OTT says, while the network operators are responsible for investment in their network infrastructures that carry OTT traffic, this OTT traffic also contributes to increased revenue for the network operators and therefore declining demand for traditional voice and text messaging services is counterbalanced by increasing demand for data which is

¹ Itublog, Q&A: What's the economic impact of 'over-the-top' (OTT) players?, March 15, 2017, url: <https://itu4u.wordpress.com/2017/03/15/qa-whats-the-economic-impact-of-over-the-top-ott-players/> [As of August 2017].

driven by the appreciation of end-users². After all, it is a matter of business who bears the infrastructure cost and it depends on countries, their market maturity as well as market participants.

Question 2:

What are the policy and regulatory matters associated with OTT?

First of all, Yahoo! JAPAN believes that International Telecommunication Union (ITU) including its Council Working Group on International Internet-related Public Policy Issues (CWG-Internet) is not an appropriate venue to discuss public policy considerations for OTTs.

Same as most of the international organizations, ITU is a place where “states/governments” are primary members, and is committed to connecting all the world’s people by allocating global radio spectrum and satellite orbits, developing the technical standards that ensure networks and technologies seamlessly interconnect, and striving to improve access to ICTs to underserved communities worldwide³. While ITU deals with several key areas of action, its Internet-related mandate is limited to relevant resolutions and should not be overly expanded, taking also into account ITU’s financial and human resource constraints.

While it is still premature to figure out the economic impacts of OTTs, public policy considerations for OTTs inevitably require multi-stakeholders’ active involvement in the various kinds of discussions from diverse perspectives. Especially, when it comes to “international” public policy considerations for OTTs, it is indispensable to analyze the market maturity of both developing and developed countries and its relationship with multifaceted Internet layers. Given that ITU has mainly dealt with the technical aspect of the Internet, it seems to be excessive for ITU to address public policy considerations for OTTs generally. Again, the role of ITU is to provide a venue to discuss standards for the global stability of communication at network level and therefore is “not” a venue to address such fields as a content layer in which each country sets its own rules.

Accordingly, Yahoo! JAPAN is not in a position to support to take up this issue for upcoming and future open consultation and physical open consultation meetings under the CWG-Internet.

² *Ibid.*

³ ITU, OUR VISION: COMMITTED TO CONNECTING THE WORLD, url: <http://www.itu.int/en/about/Pages/default.aspx> [as of August 2017].

Second, there are a huge number of elements for considering policy and regulatory matters associated with OTT. Since various OTTs exist as mentioned above, each relevant market must first be figured out based on the characteristics of services. When trying to find the relevant market, not only supply-side but also demand-side considerations must also be taken into so that questions such as whether certain OTTs are on a level playing field or whether OTTs and network operators are on a level playing field (and therefore should fall under the same regulatory framework) can be addressed appropriately⁴. In addition, as previously mentioned, the market condition of each country as well as who participates in the market (and to what extent) must be analyzed. Under the present situation, it is premature to think about policy and regulatory matters associated with OTT since there is no sufficient evidence on all of the above points. Likewise, it is far more premature to start to discuss an international legal framework on this matter and this kind of argument seems to be based on the assumption of fact without sufficient evidence.

Having said that, it is quite important for ITU to discuss how to enhance infrastructure capacity building and how to further develop the ecosystem of ICT industries as a whole in order to promote innovation and entrepreneurship in both developing and developed countries. All relevant stakeholders should be included in the discussion and also be mindful that OTTs can play an important role in benefiting the overall ecosystem only if there are no policy and regulatory barriers, i.e., only if there is an open, reliable, and transparent market which enables the free flow of data.

Third, although all relevant stakeholders should be mindful that OTTs can play an important role in benefiting the overall ecosystem only if there is an open, reliable, and transparent market which enables the free flow of data, it does not mean that any measures should not be taken at a content layer. While the free flow of data at a network layer is indispensable and must be guaranteed both domestically and internationally, necessary and reasonable measures at the content layer should be allowed at domestic level to protect legitimate interests for multistakeholders based on social and cultural backgrounds.

In this regard, while domestic OTTs must comply with a certain regulation at domestic level, that regulation is not often applied to foreign OTTs like Google, Amazon, Facebook, and Apple (“GAFA”) for several reasons in the domestic arena. Under such situation, even though a certain problem arises from the business of a foreign OTT in one country, not only its government but other stakeholders including domestic OTTs can do nothing

⁴ Itublog, *Supra* note 1.

against the foreign OTT since the foreign OTT does not have to comply with a relevant domestic law and a domestic law enforcement authority cannot exercise its jurisdiction over the foreign OTT. In order to create a level playing field at domestic level, all stakeholders should be included in in-depth discussion on how to redress such unfair and disadvantageous situation and same regulations should be applied to both domestic and foreign OTTs at domestic level.

But again, it should be born in mind that ITU is not, never an appropriate venue to hold this kind of dialogue.

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?

Yahoo! JAPAN considers that this question is somewhat biased. As far as Yahoo! JAPAN is concerned, users' security, safety, and privacy are all utmost important and it has been making every single effort to achieve and maintain all of them while utilizing various user-generated data for improving its services for the sake of its users. Moreover, Yahoo! JAPAN has been taking necessary measures to improve the information literacy of users by sharing its best practices among various international and domestic stakeholders. Therefore, Yahoo! JAPAN expects that self-regulation by OTTs will be respected and regulations will not be set or at least be kept to a minimum.

On the other hand, as is often the case with foreign OTTs, there is a case where it is difficult to expect self-regulation by foreign OTTs since a certain domestic regulation is not applied to them or a domestic law enforcement authority cannot exercise its jurisdiction over them as mentioned above. In this situation, all stakeholders including the government of a country in which its domestic law is not applicable to foreign OTTs should play an important role in addressing issues related to this situation.

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?

Please refer to Yahoo! JAPAN's response to Question 2 above. Its response to this question is the same as that of Question 2.

Question 5:

How can OTT players and operators best cooperate at local and international level? Are there model partnership agreements that could be developed?"

As a premise, cooperation between OTTs and network operators at local level should be discussed separately from that of international level. A study for the European Parliament's Committee on the Internal Market and Consumer Protection points out as follows:

The debate about the impact of OTTs is often presented in terms of the level playing field. Concerns have been voiced about the challenges faced by traditional network operators faced with the expansion of online (often US-based) firms offering products which consumers increasingly see alternatives to their offerings. Another aspect of this tension across the value chain is the network neutrality debate, which can be viewed as an effort to prevent traditional network operators from blocking or throttling competing or bandwidth-hungry online services, while permitting alternative managed services to evolve.

There are, however, other ways to view the level playing field. Perhaps a more important question is whether there is a level playing field across different countries in Europe and whether European online startups are disadvantaged compared with global competitors due to European fragmentation. The *horizontal* and *vertical* aspects of the level playing field debate (see the following figure) both represent important themes for this study⁵.

| | Europe | International |
|-------------------------|---|--|
| Online and OTT services | European online and over-the-top services | International online and over-the-top services |
| Network services | European network services | International network services |

Source: WIK-Consult

(1) Cooperation between domestic OTTs and network operators at local level

Relevant public policy should keep network operators from blocking or throttling OTT traffic and even the development of OTTs in order to increase the benefit of OTTs to the

⁵ Directorate General for Internal Policies Policy Department A: Economic and Scientific Policy, *Over-the-Top (OTTs) players: Market dynamics and policy challenges* (IP/A/IMCO/FWC/2013-046/PE 569.979), December 2015, p.12, url: [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU\(2015\)569979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU(2015)569979_EN.pdf) [As of August 2017].

overall ecosystem of ICT industries, while considering to protect consumers from various abuses which could impose excessive burden on them. In this regard, it should be born in mind that relevant public policy also depends on countries, their market maturity as well as market participants.

(2) Cooperation between foreign OTTs and network operators at local level

As mentioned above, all stakeholders including governments have room to solve the situation where a certain domestic regulation is not applied to foreign OTTs and it is difficult to expect self-regulation by foreign OTTs. Where domestic and foreign OTTs are operating in the same domestic market, solving such unfair and disadvantageous situation could be a key to create a level playing field. That said, it also depends on countries, their market maturity as well as market participants same as above.

(3) Cooperation between OTTs and network operators at international level

Again, under the present situation, it is far more premature to start to discuss an international legal framework on this matter and this kind of argument seems to be based on the assumption of fact without sufficient evidence. Further, there is a growing tendency that each international organization tries to expand its mandate to address cross-cutting Internet-related public policy irrespective of its budgetary constraint and such phenomenon results in overlapping responsibilities and the duplication of work among international organizations. Yahoo! JAPAN hopes that each international organization will deal with each relevant “aspect” of Internet-related public policy only while respecting the mandates of other international organizations, and Internet-related public policy discussion will take place at a venue where all stakeholders can participate on equal footing.
