Submission to the International Telecommunications Union (ITU) CWG-Internet on Public Policy Considerations for OTTs from the Association for Progressive Communications (APC), August 2017

About APC

The Association for Progressive Communications (APC) wishes to thank the ITU for the opportunity to respond to this Open Consultation held by the CWG-Internet on Public Policy considerations for Over-the-Top services (OTTs).

APC's mission is to empower and support organisations, social movements and individuals in and through the use of information and communication technologies (ICTs) to build strategic communities and initiatives for the purpose of making meaningful contributions to equitable human development, social justice, participatory political processes and environmental sustainability. APC is both a network and an organisation. APC members are groups and individuals working in their own countries to advance the same mission as APC. APC currently has 51 organisational members and 30 individual members active in 75 countries.

Summary

With the steady expansion of affordable broadband services, OTTs are beginning to have a significant impact on some of the revenue streams of many traditional telecommunication infrastructure operators, especially those which have based their business models on bundling the provision of physical infrastructure with high-margin voice and messaging services, and then simply 'bolting on' the provision of internet access[1]. Similarly, national authorities that have continued to only focus on the regulation of traditional telecom infrastructure operators are now finding that these regulations are becoming less and less effective in achieving their goals.

While the precise definition of OTTs requires further clarity and agreement from all stakeholders, the rapid growth of **internet-based communication and information services**, particularly those that provide a more attractive alternative to the traditional voice and messaging services of telecom infrastructure operators, highlights the fact that business models for infrastructure provision, as well as national policies and regulations, need updating. In particular, the international/distance independent nature of OTTs and other internet services creates a new dynamic that underlines the need for international multistakeholder and multilateral public interest-driven co-operation.

Initial Observations

A number of initial observations can be made in discussing the public policy dimensions of OTTs:

i. The scope of internet services that are under discussion needs to be more specifically defined - the definition of what constitutes an OTT service has not been broadly agreed, and clearly means different things to different people. The basic architecture of the Internet suggests that any service which competes with, or substitutes for traditional communication provision could be viewed as an OTT service. This could even extend to online newsletters substituting for newsprint, and streaming vídeo replacing broadcast television. However it is apparent that the key area of concern is that VoIP is taking the place of PSTN calls – a topic that has now been under policy discussion for more than two decades, with varied responses from different nations. Although the general principle that innovation should not be stifled has usually been adhered to, the recent

1 It can be observed that mobile operators in particular, have moved into the data provision market on the back of their mobile voice licenses.

growth of mobile broadband and easy to use software has now resulted in VoIP becoming a mainstream service that has caught traditional operators flat-footed, despite the early warnings.

ii. Taking the above points into account, APC's position is that discussions at ITU level on this topic should be limited to number-based interpersonal communications services (ICS), following the EU definition[2]. This would focus the discussion on VoIP and text messaging services that directly replace the existing PSTN based services that have traditionally been the under the jurisdiction of the ITU membership. Broader internet-related policy discussions relating to OTTs must take place in fora which are more open and inclusive to ALL relevant stakeholders such as the Internet Governance Forum (IGF).

iii. The internet as we know it is still under rapid evolution and care must be taken not to stifle the innovation that has already driven the development of the plethora of services that are now available, with many more expected to come. This consideration suggests that the longer term outlook need to be considered, and hasty decisions on regulation of OTTs could be detrimental to the development of services that exploit the potential of new technologies. In particular it is fairly clear that within just a few years, a minority of people will still be using traditional PSTN voice and messaging services, but that their demand for multimedia data is likely to eclipse revenues from circuit switched voice and messaging. Already, a large number of the so-called OTT services have high bandwidth needs that have driven increasing demand for underlying telecommunication data services.

iv. Most OTT services that provide a substitute for basic communication services (both voice/audio and messaging) have added features that generally make them superior to traditional services, including better security and improved useability, but most notably lower costs, as evidenced by the rapid growth in demand in developing countries, despite their relatively high cost of smartphones and broadband connections.

v. It is worth noting that the submissions to the CWG-Internet suggesting that OTTs should be subject to regulation are almost entirely from developing country traditional telecom operators. This can probably be attributed to the point that operators in these countries were overwhelmed by technology developments - the reasons mainly being many had been protected from robust competition as well as having to deal with higher operational costs (e.g up to 50% of revenues can go on refuelling base stations[3]), lower economies of scale (particularly in Africa) and high license/spectrum fees and taxes.

vi. Providers of OTT services are not in the same market as the providers of physical telecommunication infrastructure. OTT providers are very diverse and provide a wide range of different services which run on top of the underlying physical telecommunication infrastructure. OTT providers do not provide physical infrastructure to the end-user. OTT services are therefore not comparable to traditional telecommunication services. For these reasons APC's position is that OTT providers should not be subject to regulations designed for telecommunication service operators.

vii. The fact that telecommunication operator revenues in some markets are being reduced by OTT providers simply points to the fact that telecom operators in these countries have yet to adapt their business models to the modern environment in which the internet provides the basis for a myriad of value added services. The availability of OTT services ultimately creates increased demand for basic telecom infrastructure, by providing additional value added services that are in demand by the public. Therefore, to suggest (as many these telecom operators have) that they are effectively subsidising OTT services is simply incorrect. To propose that national telecom operators should be protected from OTT services by regulators simply postpones addressing the changes in telecom operator business models that are needed in order to survive in the new world.

2 Section 2.1.2 in this document: http://ec.europa.eu/information_society/newsroom/image/document/2016-52/executive_summary_2_-_services_40995.pdf

3 https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2014/11/Africa-Market-Report-GPM-final.pdf

Developed country telecom operators have already begun to, or even completed addressing these changes. As can be seen from the submissions made to this consultation, it is the developing country operators, such as those in the Caribbean (CANTO) that have been most vocal in opposing OTTs.

viii. APC acknowledges that number based OTTs, specifically VOIP and internet based messaging need to be able to respond to lawful and legitimate requests for user data, however APC is also concerned that regulation of OTTs in some countries may be an attempt to justify surveillance or limit freedom of expression. International human rights norms on privacy need to be respected, especially in some authoritarian regimes, where traditional telecom operators provide access to communications that go beyond what is lawful, necessary, and proportionate to pursue a legitimate aim, and engage in illegitimate surveillance of users. This has in fact helped drive the uptake of OTTs in many of these countries.

ix. There is already an existing international legal framework in place to deal with international data requests (Mutual Legal Assistance Treaties (MLATs)), and although thereis recognition that the MLAT system needs reform (transparency, faster resolution and more widespread adoption) MLATs are a framework that go far beyond telecoms and the internet, so the ITU is not best placed to address this. In addition, relating to improving the process and transparency of international law enforcement data requests, of note is the Internet Jurisdiction Project,[4] which has been working to address jurisdiction issues for years.

x. In addition, when States request OTTs to turn over user data, companies should seek to prevent or mitigate the adverse human rights , in line with UN General Assembly resolution on the Right to Privacy in the Digital Age,[5] the UN Guiding Principles on Business and Human Rights,[6] and recommendations included in the recent report of the UN Special Rapporteur on Freedom of Opinion and Expression, David Kaye[7]

xi. Further regulation of OTTs is not likely to be easy, due to their inherent characteristics – although the EU definition of number based ICS is probably the closest realistic definition of the OTTs that should be under discussion here, it is still difficult to make a clear technical distinction between OTTs and other Internet services – the multimedia nature of the technology means that messages can even be embedded in simple text files. In addition, many OTTs, even those that abide by the number-based ICS definition may be developed as an open-source application by volunteer programmers and simply made available at no-cost on a free web site – in these situations who is there to regulate? Aside from these technical issues, the cross-boundary/international/distance independent nature of the internet means that nationally developed regulations are likely to be ineffective.

xii. The use of OTTs has lowered the cost to communicate for people around the world, which has had a profound impact on the exercise human rights, including freedom of expression, freedom of assembly and association and the right to privacy. As such, any regulation of OTTs should be driven by the public interest and guided by international human rights norms, rather than commercial interests.

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4 https://www.internetjurisdiction.net/

5 See A/RES/71/199 which emphasises "that States must respect international human rights obligations regarding the right to privacy when they intercept digital communications of individuals and/or collect personal data and when they require disclosure of personal data from third parties, including private companies" and calls on companies to meet their responsibility to respect human rights in accordance with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, including the right to privacy in the digital age; http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/199

6 http://undocs.org/A/HRC/17/31

7 http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/22

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

As per the observations above, the key opportunity provided by OTTs is the provision of better and more affordable communication services.

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

The key need is to ensure that telecom infrastructure providers are not burdened with excessive regulation and that markets for infrastructure services are as competitive as possible. This will allow the providers of basic communications infrastructure to respond to changes in the market more effectively, rather than focussing on regulatory mechanisms to delay or minimise threats from OTTs. In this respect APC's position is that infrastructure competition, rather than service-based competition, is the best driver of network investments and innovation. This should be strengthened by incentivizing operators to invest and innovate rather than adopting "wait and see" strategies.

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

As noted above, OTTs can have superior security and privacy features, but that efficient and effective international mechanisms need to be in place to address the international nature of OTTs and the need for international data requests for law enforcement purposes, while respecting the right to privacy and due process.

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

There is no inherent reason why all existing stakeholders should necessarily be expected to survive, or that measures should be taken to ensure they do. Those that fail to adapt to the new environment should not be artificially supported. The observations made above suggest that infrastructure provision should be decoupled from the services that run over them, which is the basis of the 'internet model' of modern communications architecture. Legacy business models are not likely to be effective in this new environment and should be dropped as quickly as feasibly possible.

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

This is a new area and it is not clear that partnership or other co-operation agreements between OTT providers and infrastructure operators are an appopriate mechanism to deal with any issues relating to OTTs. Given the impact OTTs have on the exercise of human rights, it is critical for civil society actors to have a voice, and be able to meaningfully engage in, any proposed mechanism or partnership.

The IGF is likely to be the most effective platform to discuss many of the issues relating to OTTs, as it is multi-stakeholder and open in nature, and focusses specifically on the internet within a UN mandate.

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