

OTT Regulation

Key points for the democratic regulation of "Over-the-Top" services so as to ensure a free and open Internet and the full exercise of digital rights and freedom of expression

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Introduction

The growing importance of "Over-the-Top" (OTT)¹ services in the global economy and the fundamental role they play in the exercise of human rights such as freedom of expression and the right to information is undeniable. Moreover, their appearance has triggered a tough economic dispute between private stakeholders of the digital economy that has led to regulatory debates. It is also important to note that this economic conflict has an impact on people and their rights.

The central themes of this debate have been related to competition, investment or taxation. These are undoubtedly important aspects, but such an economic focus limits the way such a complex and vital matter for humanity and the rights of people is approached.

Much of the debate about net neutrality and regulatory asymmetries stems from, or is influenced by, disputes between major transnational corporations. In addition, the current development of the Internet and the increasingly important role of OTT service providers also strains the role of the State and the issue of national sovereignty, as well as the democratic forms that must be adopted to protect the right of the people in the new convergent scenario, while creating an environment that guarantees the development of a free and open Internet.

All of this represents a strong challenge for civil society organizations to adopt positions from an independent perspective,² even if we do not yet have all of the answers and solutions. As a result, more independent research and data is needed, and not just the inputs provided by companies, experts or *think-tanks* of the parties in dispute.

Although regulatory asymmetries do exist between companies competing in similar markets or offering comparable services, OTT services present regulatory challenges that themselves need to be addressed. In our view, this task should use a human rights perspective, placing people at the center of concerns, not businesses and their (legitimate) business interests.

Much of the discussion is channeled through multilateral agencies that do not consider this rights-based approach, such as the World Trade Organization (WTO) or the International Telecommunication Union (ITU).³ These are not the most appropriate fora in which to address these regulatory issues. Fortunately, UNESCO and the Rapporteurs for Freedom of Expression of the United Nations or the Inter-American Commission on Human Rights (IACHR) have included

¹ For practical reasons only, this document uses the extended term of 'over-the-top,' a definition that is also under debate.

² Although in some cases these positions may coincide with the interests of one of the parties. The case of the net neutrality debate is an example of the confluence of positions, which are not always based on the same reasons and interests

³ The inspiration for this document was the public consultation on the regulation of OTT services carried out by ITU, the deadline of which was August 29, 2017.



these issues in their agendas, thus becoming more adequate international settings.

Since the first half of the 20th century most advanced democracies have embraced the opinion that regulation in the communications sector acts as a fundamental guarantee of democracy due to the central role that a pluralistic and diverse public sphere has for its proper functioning. The quality of democracy and a vigorous civic debate depend largely on the variety of information and views competing in the public space and available to citizens.

In a scenario centralized by the traditional media, it was clear that the market on its own did not guarantee the fundamental diversity, pluralism and freedom of expression needed by democracy. With the emergence of the Internet, it seemed that part of the rationality that gave meaning and foundation to democratic regulation might have been lost. In fact, some important players in the digital ecosystem claim that regulation of the Internet is not only dangerous but should not exist, as it is no longer necessary or possible.

However, after the initial phase of more decentralized and open network operation, new bottlenecks formed and the Internet embarked on a growing centralization among just a few actors of the digital ecosystem that has affected its potential to serve all of humanity: this was underlined by the creator of the World Wide Web, Tim Berners Lee. The trend towards concentration and threats to freedom of expression on the Internet show that diversity and pluralism - and even the notion of an open and free Internet - need regulatory guarantees so that they can be maintained as values and paradigms of modern digital communications.

Based on these concepts and reasons, OBSERVACOM has drafted this document with proposals on the key aspects that should be considered in order to establish a democratic regulatory environment for OTT Internet services from the perspective of human rights and with the objective of guaranteeing digital rights and freedom of expression and a free and open Internet.

1

Just one regulation for all OTT services is inadequate

There are aspects of the regulation that should be shared by all services with users and consumers (the duty to provide transparency or protection of consumer rights, for example) and should not be bypassed. But trying to pass a single piece of legislation for all OTT service providers is a mistake, as this sector includes such a diverse range.

Taking as a point of reference principles of public interest that underpin the regulations of similar services, the regulations should take into account the



type of service and the rights to be protected in a differentiated and specific way. Services offered by financial institutions, property rentals, pizza deliveries or those providing alternative local transport considered as public services, should not be regulated in the same way.

The protection of human rights and freedom of expression are also pertinent to the Internet. However, its unique characteristics must be taken into account in relation to other technological supports in terms of tools and procedures appropriate to the digital environment. For example, the principle of child protection must be maintained whatever the platform, although the type of daytime protection programming recognized worldwide as an appropriate measure for open TV is not applicable for certain Internet services.

Particular attention should be paid to OTT suppliers providing both linear and non-linear audiovisual services.⁴ These cultural goods and services are not simply commodities subject to the rules of trade, as stated in the UNESCO Convention on Cultural Diversity. Consequently, measures to protect and promote national audiovisual industries and cultural diversity are not only a right of States but also their obligation. The European Union's efforts to regulate *video on demand* show the importance, as well as limits, of seeking to apply such principles.

2

Paying taxes without hindering innovation or stifling small or non-profit businesses

Regulatory asymmetries exist in tax matters that generate unfair competition between companies that offer similar services on other supports, in some cases, with domestic capital companies that invest and generate direct and indirect jobs in the country where they operate. At the same time, this situation implies a huge flow of capital abroad that particularly harms developing countries, which suffer economic losses and a sustained erosion of their tax base.

For this purpose, the main companies in the sector are not always established in the countries where they offer their services, either for operational reasons or as a strategy to maximize profits. The 'Double Irish' tax arrangement is when companies formally register their commercial operations in countries that are tax havens or offer lower tax burdens.

⁴ OBSERVACOM will publish a document containing proposals for the regulation of audiovisual communication services on the Internet.

Like any other for-profit business, OTT service providers should pay taxes if they undertake a commercial activity, especially if they offer services that represent competition or alternatives for existing services in a particular country. The principle of tax collection in the places of consumption and implementation of the service should prevail over the principle of collection in the country from where the service is provided.

Nonetheless, tax and other related measures should address the differences between small and large enterprises, between start-ups and consolidated OTT services that have a global reach, and between commercial OTT service providers or non-profit or educational initiatives. Among other reasons, as a way to promote competition, stimulate innovation, and allow the emergence and development of small and medium-sized national enterprises.

3

OTT service providers should not be beyond the reach of domestic laws

The regulatory challenges posed by OTT services include the difficulty of applying regulatory measures - and the questioning of the role of national governments – given that their activities take place in one or more countries, that they maintain global operations outside the locations where services are provided or consumed, and their reliance on international transactions. These difficulties cannot provide justification for OTT service providers to operate outside of the legal national or supranational framework that each State decides to adopt.

The issue of national jurisdiction is key to ensuring sovereignty in a global environment. There is no way to make progress in the discussion of taxation or to establish effective mechanisms for the rights of people without adequately resolving this issue. This implies respect for local laws on such matters, beginning with the formal registration of the company in the country where it offers its services.⁵

In the meantime, other issues also require global solutions. Thus, it will be necessary to combine strategies and areas of application in order to blend self-regulation, co-regulation, regulation by national states and multisectoral forums (including the participation of companies and civil society organizations), as well as international agreements and commitments.

⁵ Registration does not imply the obligation to obtain a license through a prior competitive procedure, and its requirements must contemplate the conditions proposed in point 3 regarding start-ups and non-profit initiatives, among others.



Issues related to global Internet governance should be addressed in multi-stakeholder environments according to the principle of the active and democratic participation of representatives of different interests, as a way to ensure the global nature of the Internet and mitigate possible violations and abuses. This would coincide with the recommendations of the Special Rapporteur for Freedom of Expression of the IACHR and UNESCO.

Moreover, there is a need to establish strategies and mechanisms for joint action among the countries of the region in order to obtain negotiation and enforcement capacity vis-à-vis private corporations that function at the global level. Latin America is analyzing and discussing initiatives in the search for regional agreements for joint action in the digital economy.

4

Gatekeepers: States should ensure network neutrality as a basic principle of the Internet

Regulation is a fundamental act necessary to guarantee rights. In the case, it is necessary for companies that provide OTT services in the face of possible abuses by states or other actors in the digital ecosystem, and to strengthen their role as key intermediaries in the exercise of rights by that segment of the population that uses their services or platforms.

In line with the recommendations issued by the IACHR Rapporteurship for Freedom of Expression, the principle of net neutrality should be expressly included in national legal frameworks, with the scope and exceptions recognized by this body. This principle was recognized by the Office of the Special Rapporteur as "a necessary condition for exercising freedom of expression on the Internet", which aims to guarantee that "free access and user choice to use, send, receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference".

This principle is especially applicable to operators of physical networks that are Internet service providers (ISP), so that they do not offer discriminatory preferential treatment to OTT service providers in exchange for marketing agreements or other reasons. This principle should also apply to zero-rating plans as well as the marketing strategies of some OTT service providers - as occurs in partial Internet access initiatives such as Free Basics - when these affect the principle of access to an open and free Internet.

Under no circumstances should principles maintained in the public interest, such as net neutrality, be relaxed with the intention of generating some kind of balance or compensation to overcome existing regulatory asymmetries.

5

States should guarantee freedom of expression: No legal responsibility for third-party contents

OTT service providers are private actors which have become essential tools for exercising the right to information and freedom of expression on the Internet - as in the case of social networks, search engines and other platforms. It is therefore necessary to preserve and enhance this task. This same role of intermediaries, however, has placed them under pressure to "take advantage of the position they occupy as points of control of access and use of the Internet," according to the Rapporteurship of the IACHR.

Whether because such a position makes it easier to "identify and coerce such actors rather than those who are directly responsible for the expression that is to be repressed or controlled," or the impact that pressure placed on a single company has on all the users to be impacted, third party content has become a crucial aspect of safeguarding freedom of expression.

In view of this, States should promote and protect the exercise of freedom of expression by adopting legislation, policies and administrative practices that provide an adequate regulatory environment for OTT service providers, in order to deal with threats and unlawful pressures of content removal, filtering or blocking by State authorities and other private actors.

For this reason, we concur with the Rapporteurship that the objective or "strict" liability, which holds the intermediary responsible for any content on its platform considered to be unlawful, is incompatible with the American Convention on Human Rights, and promotes the monitoring and censorship of intermediaries, forcing them to occupy a judicial function that doesn't correspond to them.

Regulation should incorporate the notion that "no one who simply provides technical Internet services such as providing access, or searching for, or transmission or caching of information, should be liable for content generated by others, which is disseminated using those services, as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so ('mere conduit principle')"

as set down in the Joint Declaration on Freedom of Expression and Internet 2011.

This issue does not mean that intermediaries do not have “any responsibility” for the exchange of content through their platforms, as they are not mere technical services⁶ and do undertake interventions when prioritizing or amplifying certain contents of third parties, for example, without being pressured by the State to do so.

6

States and OTT companies should guarantee the right to privacy and protection of personal data

The right to privacy is a human right and its protection is at risk because digital technologies technically allow an increasing ability to collect, store and exchange personal data in terms now referred to as ‘*big data*’. This implies that an enormous amount of information about people can be intercepted and analyzed without knowledge of such actions or prior and express consent.

Faced with these challenges, governments should respect and protect the right to privacy on the Internet and ensure that their legislation and actions protect all persons under their jurisdiction, which includes ensuring the confidentiality of online personal data and responding to the growing and indiscriminate surveillance and interception of communications on the Internet. This is because, according to the UN Human Rights Committee, when such monitoring is carried out on a massive scale it has negative effects on the enjoyment and exercise of human rights.

OTT service providers should be protected from the actions of some governments, police and other State authorities that pressure them to record or share personal data, when conditions that grant legitimacy to such requests are not met, such as being made through a specific and express request by a judicial authority.

The regulation should also protect people “against possible arbitrary or abusive interference from third parties” as recommended by the IACHR Rapporteurship for Freedom of Expression, while “the business model of the most successful companies has a direct impact on the right to privacy”.

⁶ See point 9

We must demand greater transparency from States in terms of their policies and surveillance protocols and from private corporations that offer OTT services as requested by the States, and the actions and reasons for their responses. This also applies to the policies of such corporations for the use of personal data, and "private surveillance" mechanisms of the personal communications of their users for commercial purposes, including knowing how algorithms process such data.

7

New gatekeepers: OTT service companies should guarantee access to an open and free Internet

Without intermediaries, it would be humanly impossible to enjoy the enormous potential available in the network of networks. Companies that provide platforms and applications on the Internet play a key role in terms of access to an open and free Internet, given the task they perform as intermediaries between users and the content available on the network.

However and paradoxically, this new and vital role makes them a potential risk for freedom of expression and the free flow of information on the Internet.

Such intermediaries no longer provide just technical support and "transit routes", but often affect the contents that circulate through such routes. Not only are they able to monitor all content produced by third parties, but they can also intervene in them, ordering and prioritizing their access and, therefore, determining what contents and sources of information a user may or may not view. They can also block, eliminate or de-index content – such as speeches protected by the right to freedom of expression - as well as users' accounts or profiles. These actions are often forced by external pressures from government authorities or other private actors, but also by the decisions taken by the intermediaries themselves.

Algorithms are responsible for key decisions about the contents we can access, facilitating or hindering access to the content on the Internet. Algorithm design and the use of forms of artificial intelligence that select the contents that we can view in terms of preferences with the aim of leaving a person "satisfied" and "comfortable" can have good intentions and be a successful commercial strategy to attract users, but are not necessarily compatible with diversity and

pluralism, fundamental requirements for the proper functioning of a democratic society.⁷

Such access that is conditioned to content, as well as the removal of content considered "inappropriate" or "offensive" -in the opinion of the companies themselves and their "moderators"- are carried out with a lack of transparency and due process in terms of the decisions taken or right of appeal. The main companies in the sector do not even publicly report how much content they have decided to withdraw. All of which distances them from international standards on legitimate restrictions on freedom of expression, including the Manila Principles on Intermediary Liability.

International organizations for the protection of freedom of expression have begun to warn about this problem. UN Rapporteur David Kaye stated that "It is all too common for private companies to censor, conduct surveillance, or enforce other restrictions on freedom of expression, often under pressure from governments, but sometimes on their own initiative." For IACHR Rapporteur Edison Lanza, "the lack of transparency in the decision-making process by intermediaries often disguises discriminatory practices or political pressures that determine the decisions of companies." In a Joint Statement on fake news, meanwhile, Rapporteurs for Freedom of Expression were "appalled by some measures taken by intermediaries to limit the consultation or dissemination of digital content", such as "content elimination systems based on algorithms or digital recognition". These mechanisms, according to the Rapporteurs, "are not transparent, violate minimum standards of due process and/or unduly limit access to or dissemination of content".

8

The neutrality of platforms should also be a basic principle of the Internet

Inter-American standards include the principle of net neutrality as an indispensable condition for freedom of expression on the Internet. The objective is, as mentioned above, to ensure that "freedom of access and choice of users to use, send, receive or offer any content, application or legal service through the Internet is not conditioned, directed or restricted by means of blocking, filtration, or interference".

⁷ The impact on the US presidential election campaign, the results of searches for information and views on Jews and the Holocaust, or the removal of photos of the "napalm girl" and semi-naked Brazilian or Australian native peoples are some of the more well-known examples.



The same principle should be extended to other intermediaries - that is to say not just ISPs – and with the same purpose of ensuring diversity, pluralism and access to a free and open Internet. This is important because many of these platforms - and the algorithms they use - are increasingly responsible for fundamental decisions about the content that people access.

The level of potential or real interference with Internet content places a huge responsibility on intermediaries who -and if no democratic regulation is in place- in fact become a form of private regulators never witnessed before. This situation is aggravated by the weakness of democratic states to regulate phenomena that transcend their administrative boundaries.

The concept of "neutrality" also holds true for these actors of the digital ecosystem, as OTT service corporations have the potential to affect freedom of expression "by conditioning, directing or restricting" content "through blocking, filtering, or interfering" if they do not act in a neutral way with respect to the information and opinions that circulate through their platforms and applications.

That this ability to be a *gatekeeper* lies in the control of a physical or virtual layer of access, should not affect the principle that gave rise to the notion of net neutrality and placed it as a key issue in the agenda for freedom of expression of the Internet. In fact, there is no indication of systematic and widespread evidence of a violation of freedom of expression based on political or ideological reasons on the part of ISPs to identify a serious problem for this fundamental right, and to conclude that it was a basic principle which should be regulated through the adoption of national laws.

9

Concentration is also found on the Internet; it's growing and has a negative impact on freedom of expression

The existence of monopolies and oligopolies within the traditional media is a reality in the Latin American region, as evidenced by numerous academic studies and documented by international organizations such as UNESCO.

The arrival of the Internet was supposed to lead to the elimination of obstacles to produce, spread and find such a wide range of information and opinions, and it was deemed anachronistic and impertinent to even mention the idea of "concentration". However, the processes of concentration and the constitution of dominant positions are also found in the new digital ecosystem. This is

happening among Internet Service Providers (ISPs) and telecommunication companies, as well as among the associated OTT service providers or intermediaries, and in key areas related to freedom of expression and the right to information.

Evidence shows a trend towards greater concentration in the hands of a few transnational corporations as a result of the dynamics of the current Internet business model.

This accumulation of power is not only a result of the success of services and goods provided to users, but also the characteristics of a "network economy": the global scale of the business, the ability to raise capital for the necessary investments, and the mergers or purchase of other competing or complementary companies, among others. The dispute over the radio spectrum and the Internet of Things (IoT), and especially the ability to monetize the resulting *big data*, seem to point to processes that are deepening the current level of concentration.

Concern over concentration in the area of OTT services is justified, and beyond aspects of economic competition, given that several of the business corporations that have significant market power and a dominant position on the Internet are owners of platforms that enable the free flow of information and other relevant content such as social networks, search engines, communication applications and video sharing platforms. In this concentrated environment, the potential risks to access, diversity and pluralism of ideas and information that have already been mentioned become exacerbated.

10

Neither deregulation to resolve asymmetries, nor self-regulation as the only solution

Even though there are problems involved with finding a suitable form of regulation for OTT services, along with the risks of abusive State interventions, it is not acceptable to give up the search for democratic rules for the functioning of our societies, even in the digital environment.

Self-regulation is part of the response to these challenges as long as it is carried out with respect for the international human rights framework and is compatible with standards such as the UN Human Rights Council's "Guiding Principles on Business and Human Rights." The terms of use and codes of conduct adopted, for example, should not establish rules that are contrary to freedom of expression.



The more self-regulation and better business practices, the less need for State intervention, which is a desirable approach. But this cannot be the only solution. We should not privatize the democratic game rules of our respective societies. The market alone is unable to guarantee the freedom of expression of all people or the existence of inclusive democracies.

On the other hand, trying to resolve the asymmetries between comparable services by eliminating all of the rules for regulated sectors would be a serious setback in a democratic society, and the work that has been done to secure fundamental human rights, as well as representing a renunciation of the obligation to protect these rights that belongs to the State. For example, this might mean removing all the obligations and compensation of those companies, and eliminating the guarantees for effective protection of the rights of the people before them.

The scope of some of the economic or administrative regulations could potentially be simplified or revised as long as it is strictly necessary and does not lead to a reduction in the protection of human rights.

Faced with the fear of abusive State intervention and all forms of censorship, the best antidote is the one that the agencies of the Inter-American Human Rights System and the United Nations have developed to guide the protection of rights: regulations must comply with international standards for freedom of expression in order to be legitimate. There should be no difference in the way we address regulatory discussions regarding the Internet and OTT services.



The Latin American Observatory of Regulation, Media and Convergence (OBSERVACOM) is a non-profit, professional and independent regional think tank, composed of experts and communication researchers committed to the protection and promotion of democracy, cultural diversity, human rights and freedom of expression.

OBSERVACOM addresses public policies and regulations on audiovisual communication services, the Internet and other information and communication services in a digital and convergent environment, focusing on aspects related to access, diversity and pluralism.

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