

ARTICLE 19

ITU: Draft of the Future International Telecommunications Regulations

October 2012

Legal analysis

Executive summary

In December 2012, the World Conference on International Communications (WCIT 2012) will be taking place in Dubai with a view to reconsider the International Telecommunications Regulations (ITRs) for the first time since 1988 under the aegis of the International Telecommunications Union (ITU).

One of the key questions that will be examined at WCIT is whether or not ‘ICTs’ or the Internet should fall within the scope of the ITRs.

As the ITU has traditionally operated under a very closed-up, top-down decision-making process, civil society groups are concerned that the ITR review process might be used to fundamentally change the multi-stakeholder model that has been the hallmark of Internet governance up until now. There is also a concern that this process will have a detrimental impact on the open Internet, freedom of expression and access to information.

Our legal analysis concludes that whilst the ITU might not be overtaking the Internet just yet, some of the proposals that have been made give no ground for complacency on the part of civil society, governments and businesses who want to preserve our Internet freedoms.

In this analysis, ARTICLE 19 reviews key areas of concerns over the ITRs. We examine the question of definitions and scope of the ITRs as well as proposals that would give greater control to the ITU over content-related aspects of Internet policy. We also review the proposal of the European Telecoms Network Operators (ETNO) on new IP interconnection pricing scheme and its impact on net neutrality. Finally, we highlight a number of factors mitigating fears that the ITU might be overtaking the Internet.

Recommendations

1. Every effort should be made to oppose the inclusion of the terms ‘ICTs’, ‘Internet’ or ‘IP Protocol’ in the International Telecommunications Regulations (ITRs”);
2. References to ‘spam’, ‘cyber-crime’, ‘cyber-security’, ‘data preservation, retention, protection’, ‘protection of personal information, privacy and data’, ‘information and network security’, ‘fraud’ and other similar wording should be rejected;
3. The proposal of European Telecoms Network Operators should be resisted as seriously undermining the net neutrality principle;
4. As a matter of international law, States should make a reservation to those clauses that fail to comply with international standards on freedom of expression and the right to privacy on the Internet;
5. Should the revised ITRs fall well below the international standards on freedom of expression and privacy, States should not sign the revised ITRs;
6. The ITU should open-up its decision-making processes and make its reports and other documentation available free-of-charge.

About the Article 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme publishes a number of legal analyses each year, comments on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at <http://www.article19.org/resources.php/legal/>.

If you would like to discuss this analysis further, please contact Gabrielle Guillemin, Legal Officer at gabrielle@article19.org. Additionally, if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org or call us at +44 20 7324 2500.

Introduction

In December, the World Conference on International Communications (WCIT 2012) will be taking place in Dubai. The stated purpose of the conference is to review the International Telecommunications Regulations (ITRs) for the first time since 1988 under the aegis of the International Telecommunications Union (ITU).¹

The ITU is the UN-specialised agency that has traditionally been tasked with standardization and spectrum management.² Since 1992, its main sectors of activities have been known to include Telecommunication Standardization (ITU-T), Radiocommunication (ITU-R) and Telecommunication Development (ITU-D).³ Furthermore, the basic provisions of its Constitution highlight the largely promotional nature of the ITU's activities.⁴

Nonetheless, with the development of new technologies and ways of communicating, the ITU has shifted its focus, now presenting itself as the 'United Nations specialised agency for information communication technologies (ICTs)'. Indeed, its overview page emphasises that 'ICTs underpin everything we do'.⁵

As the basic texts of the ITU, and the ITRs in particular, were adopted in the pre-digital age, the question has become whether or not 'ICTs' or the Internet should fall within the scope of the ITRs, and indeed what the role of the ITU and governments in this new 'ecosystem' might be. This has led to fears in civil society circles that the ITR review process might be used to fundamentally change the multi-stakeholder model which has been the hallmark of Internet governance so far and that it may have a detrimental impact on the open Internet, freedom of expression and access to information.⁶

At the same time, it is important not to forget that this process is also very much about the relationship between telecom operators and information service providers and the economics of interconnections.⁷ All these issues will be at the heart of WCIT 2012, where the 193 member states of the ITU will discuss various proposals to adapt the ITRs to the new ICT environment.⁸

¹ See ITU webpage about WCIT 2012; available at: <http://www.itu.int/en/wcit-12/Pages/overview.aspx>.

² See ITU history; available at: <http://www.itu.int/en/history/overview/Pages/history.aspx>.

³ *Ibid.*

⁴ See Article 1 of Chapter 1 of the ITU Constitution: available at: <http://www.itu.int/net/about/basic-texts/constitution/chapter1.aspx>. One exception to this is Article 1 (2) (a), which provides that the ITU "shall effect allocation of bands of the radio-frequency spectrum, the allotment of radio frequencies and the registration of radio-frequency assignments and, for space services, of any associated orbital position in the geostationary-satellite orbit or of any associated characteristics of satellites in other orbits, in order to avoid harmful interference between radio stations of different countries."

⁵ See ITU overview page; available at: <http://www.itu.int/en/about/Pages/overview.aspx>.

⁶ See joint civil society letter of 17 May 2012, available at: <http://www.article19.org/resources.php/resource/3229/en/itu:-greater-transparency-and-participation-needed-in-wcit-2012>

⁷ See in particular Milton Mueller's analysis of the economic implications of the ITR review process, available here: <http://www.internetgovernance.org/2012/06/07/threat-analysis-of-wcit-part-2-telecommunications-vs-internet/>

⁸ See several background briefings prepared by the ITU: <http://www.itu.int/en/wcit-12/Pages/WCIT->

In this analysis, ARTICLE 19 examines the key proposals to amend the ITRs which are most likely to have a negative impact on Internet freedoms.⁹ We conclude that whilst concerns of the ITU overtaking the Internet might be overstated,¹⁰ some of the proposals that have been made give no ground for complacency on the part of those who want to preserve Internet freedoms.¹¹ In particular, we recommend that: (i) every effort should be made to oppose the inclusion of the terms ‘ICTs’ or ‘Internet’ in the ITRs; (ii) proposals touching on substantive Internet policy issues (as opposed to purely technical issues) should be strongly resisted; (iii) the European Telecoms Network Operators (ETNO) proposal should be rejected as undermining the net neutrality principle.

Our legal analysis focuses on four key issues. First, we review the question of definitions and scope of the ITRs. Second, we examine proposals that would give greater control to the ITU over content-related aspects of Internet policy. Third, we review the proposal of the European Telecoms Network Operators (ETNO) on new IP interconnection pricing scheme and its impact on net neutrality. Fourth, we highlight a number of factors mitigating fears that the ITU might be overtaking the Internet. Recommendations on how these issues should be addressed are included throughout the analysis.

[backgroundbriefs.aspx](#)

⁹ Our analysis is based on the document made available on the ITU website: <http://www.itu.int/en/wcit-12/Documents/draft-future-itrs-public.pdf>. However, we have had sight of more detailed proposals as part of the UK working group on WCIT (restricted access) and the wicleaks website: <http://wicleaks.org/>.

¹⁰ See Milton Mueller’s analysis cited above at note 7.

¹¹ ARTICLE 19 will take part in the official UK delegation to WCIT. This paper represents our views alone.

Analysis

Definitions and scope of the ITRs: maintain the status quo

Purpose and scope

The ITRs were adopted in Melbourne, Australia in 1988. Article 1 deals with the purpose and scope of the ITRs. Under clause 1.1, this includes the adoption of *general principles* relating to ‘the provision and operation of international telecommunication services offered to the public’ as well as to ‘the underlying international telecommunication transport means used to provide such services’.¹² Clause 1.3 further provides that the ITRs are established with a view to ‘facilitating interconnection and interoperability of telecommunication facilities’ and ‘to promoting the harmonious development and efficient operation of technical facilities, as well as the efficiency, usefulness and availability to the public of international telecommunication services’.

A number of clauses of Article 1 are concerned with the non-binding nature of ITU recommendations, which are meant to flesh out the general principles laid down in the ITRs. By contrast, it should be noted that under Article 4.3 of the ITU Constitution, the ITRs themselves are binding. However, thanks to their generally loose wording, states have traditionally enjoyed great latitude in their implementation.

According to the draft of the future ITRs, no significant changes are proposed to Article 1 save for the use of language suggesting stricter compliance with the ITRs (*‘shall provide’*). Given the possibility that ‘ICTs’ or ‘the Internet’ might be included in the definitions of the ITRs and the potential implications for Internet freedoms (see further below), ARTICLE 19 generally recommends the use of non-prescriptive language in Article 1 and throughout the ITRs. In our view, compliance with ITU standards should remain voluntary in nature; i.e. maintain the status quo with ‘ITU recommendations’ rather than requirements.

Definitions

Article 2 of the ITRs defines a number of terms, including ‘telecommunication’ (clause 2.1) and ‘international telecommunication service’ (clause 2.2). The key issue is whether or not the revised ITRs should include a definition or explicit reference to ‘ICTs’ or the Internet, which are currently missing.

Broadly speaking, three types of proposals have been put forward: (1) maintain the *status quo*; (2) replace ‘telecommunication’ with ‘ICTs’ but maintain the current definition of telecommunication; (3) include a broad definition of ‘ICTs’ that would either expressly or impliedly include the Internet (e.g. CWG/4/53).

ARTICLE 19 strongly opposes the inclusion of the Internet in the definitions of or indeed throughout the ITRs for two main reasons:

¹² Article 1.1 of the ITRs.

- *Firstly*, we believe that this would unduly broaden the mandate of the ITU, which is ill-equipped to deal with broader Internet-policy and fundamental rights issues. In particular, the ITU has maintained a relatively closed and non-transparent decision-making process in contrast to the open, decentralised, multi-stakeholder model that has allowed the Internet to flourish.¹³
- *Secondly*, it seems undesirable from an economic perspective to bring the Internet - and hence information services - within the ambit of the ITRs since this, in practice, would mean greater regulation of those services in relation to interconnection arrangements (see also Part III about the ETNO proposal below).¹⁴

Similarly, we urge member states to resist the introduction of the term 'ICTs' in the ITRs. In our view, 'ICTs' is a broad term, which clearly includes the Internet.¹⁵ The term 'ICTs' has been used for some years to refer to the convergence of audiovisual and telephone networks with computer networks.¹⁶ It is now increasingly used in common parlance in relation to Internet policy matters, especially online content regulation. By contrast, 'telecommunication' has traditionally assumed a narrower, more technical, definition. Given the dynamic evolution of the term 'ICTs' as a matter of practice, we believe that it would be artificial to seek to confine the definition of 'ICTs' to that of 'telecommunication'. For this reason, we are not convinced by proposition 2 outlined above and generally favour the status quo.

Finally, and in the same vein, we reject the inclusion in definitions or elsewhere in the draft of the future ITRs of the terms 'data processing', 'data transmission', 'Internet traffic', 'Internet protocol', 'IP interconnection' or words to that effect. We also caution against the use of these terms disjunctively, such as the term 'traffic' where it might be understood as encompassing 'Internet traffic' or 'data traffic' (e.g. 'traffic termination services'). Definitions which effectively refer to 'VoIP' should equally be rejected (see Part III below).

Recommendations:

- The inclusion of the terms 'ICTs', 'Internet' or 'IP Protocol' in the ITRs should be avoided. The language of Article 1 of ITRs should remain non-prescriptive.
- The inclusion of the terms 'data processing', 'data transmission', 'Internet traffic', 'Internet protocol', 'IP interconnection' or words to that effect should be avoided in the ITRs.
- The current status quo of the ITRs should be maintained.

¹³ See civil society joint letter of 6 September 2012; available at : <https://www.cdt.org/letter/sign-letter-opposing-itu-authority-over-internet>.

¹⁴ See Milton Mueller, *supra note 7*.

¹⁵ See for example, UNCTAD, *ICT Development Indices*, 2003, p 3; available at: http://unctad.org/en/Docs/iteipc20031_en.pdf.

¹⁶ E.g. Jan Herzoff, *The ICT Convergence Discourse in Information Systems Literature*, 2009; available at: <http://csrc.lse.ac.uk/asp/aspecis/20090218.pdf>.

Proposals to include cyber-security and related issues should be rejected

Several proposals have been made in the Draft of the Future ITRs to add an Article 5A and Article 5B to deal with 'confidence and security of telecommunications/ICTs'. Among other things, the proposed amendments include references to 'spam', 'cyber-crime', 'cyber-security', 'data preservation, retention, protection', 'protection of personal information, privacy and data', 'information and network security' and 'fraud'.

ARTICLE 19 generally opposes the inclusion of such terms and related proposals, which would legitimise at the international level both greater control by Member States over content on the Internet and potentially sweeping surveillance practices. We recognise, however, that the practical impact of some of these proposals may be limited to the extent that their wording is generic and confined to encouraging cooperation - which may already be existing - in the field of cyber-security and related areas, e.g. 'Member States should cooperate to take action to counter spam'. Moreover, as Milton Mueller points out, some proposed amendments go no further than what some States are already doing, e.g. most States already have legislation in place to counter spam or protect privacy to some degree.¹⁷ Equally, it is unclear that the draft ITRs authorise action or measures that States cannot already take nationally, e.g. 'prevent, detect and respond to cyber-crime'.¹⁸

Nonetheless, we remain of the view that these issues, insofar as they are content-related - have no place in the ITRs, which should remain confined to high level principles on technical standards relating to the infrastructure on which the Internet runs. We reiterate that the ITU is ill-suited as a forum for broader Internet policy issues for the reasons outlined above. Some proposals clearly illustrate this point. For example, the mere suggestion that States should be required to cooperate to harmonize their laws on data retention (presumably under the auspices of the ITU) seems to ignore the difficulties and controversies surrounding the implementation of the EU Data Retention Directive.¹⁹ Moreover, the ITU would be duplicating the work of other international organisations such as the Council of Europe (COE) or the OSCE which have worked on some of these issues for many years but are far more open and have expertise of their human rights implications, e.g. the COE Cybercrime Convention.

Several other proposals are a matter of concern, although the number of alternative proposals on cyber-security (chiefly laid down in new Article 5A) seems to indicate a lack of consensus on these issues. In this regard, one can cite, for example, the requirement to identify subscribers (CWG/4/228, Article 5A.8) or the lack of unrestricted access to international telecommunications services where they are used for the purposes of 'interfering with the internal affairs or undermining the sovereignty, national security, territorial integrity and public safety of other States' or 'to divulge information of a sensitive nature' (ibid, Article 5A.4).²⁰

¹⁷ See Milton Mueller, *Threat Analysis WCIT part 4:the ITU and Cybersecurity*, 21 June 2012; available at: <http://www.internetgovernance.org/2012/06/21/threat-analysis-of-the-wcit-4-cybersecurity/>

¹⁸ *Ibid.*

¹⁹ For more details on the implications of the data retention proposals, see CDT's analysis, available here: https://www.cdt.org/files/pdfs/Cybersecurity_ITU_WCIT_Proposals.pdf

²⁰ For a more contextual analysis of these provisions, see Milton Mueller, cited above at n17 and Dwayne Winseck, *The ITU and the Real Threats to the Internet, Part IV: the Triumph of State Security and Proposed Changes to the ITRs*, 19 June 2012, available here: <http://dwmw.wordpress.com/2012/06/19/the-itu-and-the-real-threats-to-the->

While these proposals may not prove to pose much of a threat to the extent that they do not garner sufficient political support - which seems plausible - they remain fundamentally at odds with the open Internet and Internet freedoms. Ultimately, however, the key issue is for ICTs, the Internet and cyber-security to be removed from the ambit of the ITRs altogether.

Recommendations:

- References to 'spam', 'cyber-crime', 'cyber-security', 'data preservation, retention, protection', 'protection of personal information, privacy and data', 'information and network security', 'fraud' and other similar wording should be rejected.

The ETNO proposal would seriously undermine net neutrality

Should the Internet or ICT fall within the ambit of the ITRs ARTICLE 19 considers that the most serious threat to the very functioning of the Internet and the free flow of information comes from the proposals of the European Telecommunications Network Operators association (ETNO). We believe that if these proposals were accepted, the net neutrality principle would be seriously undermined.

It is worth remembering at the outset that telecom operators ('telcos') and information services have historically evolved under very different regulatory regimes. While telcos were usually chiefly concerned with the infrastructure layer to provide telecommunication services and were tightly regulated (e.g. licensing requirements), information services, by contrast, evolved in a separate category, largely free from regulation, riding on top of that infrastructure (the application layer). Over time, however, telcos became increasingly deregulated and the old state-owned monopolies were dismantled. At the same time, evolving new technologies allowed the application layer to provide services 'over the top' that offer cheaper alternatives to traditional telecommunications services and broadcasting networks, e.g. VoIP (skype) or video streaming.

Unsurprisingly, telcos have been deeply dissatisfied with the current regulatory and pricing regime under which over-the-top (OTT) application services have been able to use their infrastructure to send growing Internet data traffic and make money from it with no return for them.

The ETNO proposal therefore seeks to do three things:

- introduce a new pricing scheme under which sending networks, i.e. content providers, OTT services and other application services, are required to pay to interconnect with incumbent telcos ('sending party network pays' principle); in the same vein, the ETNO proposal refers to 'fair compensation for carried traffic';
- push for new interconnection models providing for end-to-end Quality of Service (QoS) delivery to information service at a premium; and
- ensure that Member States will allow all of the above to be negotiated between telcos and information services rather than being imposed by governments.

internet-part-iv-the-triumph-of-state-security-and-proposed-changes-to-the-itrs/

ARTICLE 19 finds the ETNO proposal deeply problematic for several reasons:²¹

- The idea that QoS will be guaranteed at a premium (or differentiated QoS) is at odds with the net neutrality principle which essentially posits that there should be no discrimination in the treatment of Internet traffic, based on the device, content, author, or the origin and/or destination of the content, service or application. By the same token, it is also in breach of international standards of freedom of expression.²² In practice, this proposal should be rejected by those countries which have already guaranteed net neutrality in their legislation such as the Netherlands or Chile. We also believe that this proposal will undermine efforts towards the adoption of EU rules explicitly protecting net neutrality.²³
- The ‘sending party networks pay’ proposal is essentially an attempt to apply the international telephone regime to IP interconnections, something which would be both overly expensive²⁴ and out of sync with the settlement-free peering interconnection system that has allowed the Internet to flourish.²⁵ It is also worth remembering at this stage that those on the receiving end, i.e. Internet users, already pay to get access to the Internet.²⁶
- Other possible repercussions of the ‘sending networks pay’ proposal could include reduced access to the Internet in less developed countries as information service providers may decide that there is no business case for routing traffic to certain countries. This in turn would have an impact on the realisation of other rights, meaningful democratic participation and economic development.²⁷
- Finally, the ETNO proposal would run the risk of covering information service providers under the term ‘operating agencies’ as opposed to ‘recognised operating agencies’, which has traditionally covered telecommunication service providers licensed by government at the infrastructure layer. In other words, this would seemingly bring information service providers under the more tightly regulated model of traditional telecommunication services, including licensing and the ‘sending networks pay’

²¹ The proposal has been criticised, among others, by Milton Mueller in *Threat Analysis of WCIT Part 3: Charging you, charging me*, 9 June 2012; available at: <http://www.Internetgovernance.org/2012/06/09/threat-analysis-of-wcit-part-3-charging-you-charging-me/>

²² See Four Special Mandates on Freedom of Expression, Joint Declaration on Freedom of Expression and the Internet, June 2011; available at: <http://www.article19.org/data/files/pdfs/press/international-mechanisms-for-promoting-freedom-of-expression.pdf>

²³ On the EU implications of the ETNO proposal, see La Quadrature du Net, *Dominant Telcos Try to End Net Neutrality Through ITU*, 13 September 2012; available at: <http://www.laquadrature.net/en/dominant-telcos-try-to-end-net-neutrality-through-itu>

²⁴ One need only think of already exorbitant international roaming charges for mobile communications. See EDRI, *ENDitorial: The ETNO's WCIT proposals are not as bad as some say*, 10 October 2012.

²⁵ For more details see Centre for Democracy and Technology, *ITU proposal threatens to impair access to open, global Internet*, 21 June 2012, available at: https://www.cdt.org/files/pdfs/CDT_Analysis_ETNO_Proposal.pdf

²⁶ See EDRI, *supra note 24*.

²⁷ See CDT, *supra note 25*.

interconnection regime, in contrast to the more competitive environment in which the Internet has become so successful.

Recommendations:

- The ETNO proposal should be rejected as seriously undermining the net neutrality principle.

Impact of WCIT

There is no doubt that some of the proposals that will be on the table at WCIT 12 are deeply disturbing and at odds with both the way in which the Internet operates and digital freedoms generally. These proposals should be strongly resisted.

At the same, it appears that the importance of both the ITU and the ITRs should not be overstated for a number of reasons. First of all, it seems doubtful that a rather technical treaty about telecommunications - which was relatively unknown until now - would have a significant impact on Internet policy in ITU Member States. Secondly, the ITU has a mixed record on expanding its mandate in respect of ICTs,²⁸ even though the potential seriousness of an expanded mandate should not be dismissed. Thirdly, the ITU does not have enforcement powers.²⁹ Fourthly, the ITRs would have to be read consistently with Member States' other treaty obligations in any event.³⁰ Fifthly, under international law, States may make reservations to clauses which they find objectionable;³¹ and finally, Member States could always denounce or withdraw from the ITU Convention, and hence the ITRs.³²

Recommendations:

- States should make a reservation to those clauses that fail to comply with international standards on freedom of expression and the right to privacy on the Internet;
- Should the revised ITRs fall well below the above standards on freedom of expression and privacy, States should consider not signing the revised ITRs;
- The ITU should open-up its decision-making processes and make its reports and other documentation available free-of-charge.

²⁸ See Milton Mueller, *Threat Analysis of ITU's WCIT Part I: Historical Context*, 24 May 2012, available at: <http://www.Internetgovernance.org/2012/05/24/threat-analysis-of-itus-wcit-part-1-historical-context/>

²⁹ See Milton Mueller, *supra note 7*.

³⁰ Under Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, treaties should be interpreted taking into account any relevant rules of international law applicable in the relations between the parties.

³¹ Article 19 of the Vienna Convention on the Law of Treaties; more specifically, see Article 10.3 of the Draft of the Future ITRs.

³² See Article 57 of the Constitution of the ITU.