Consultative Document

FRAMEWORK ON OVER-THE-TOP SERVICES (OTTS) IN TRINIDAD AND TOBAGO

Maintenance History		
Date	**Change Details**	**Version**
06 June 2015	Towards the Treatment of OTT Services document published for consultation	0.1
18 July 2018	Discussion paper on net neutrality and OTTs published for first round of consultation	0.1
19 October 2021	Final version of the Discussion Paper and decisions on recommendations (DORs) published	0.2
29 August 2022	Discussion paper transformed into a framework on OTTs and published for the first round of consultation	0.3
25th August 2023	Framework on OTTs published for the second round of public consultation.	0.4

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1 Introduction

1.1 Background

According to the International Telecommunication Union (ITU)[1], over-the-top services (OTTs) are reshaping and expanding the entire communication ecosystem, whilst strengthening ubiquitous connectivity and providing social and economic benefits to consumers and the global economy. Considering the growing presence of OTTs, both in international and national markets, the ITU has encouraged Member States to "consider and develop enabling policies and/or regulatory frameworks to foster fair competition between network operators and providers of OTTs" (ITU, 2019).

Globally, OTT regulation presents a varied picture and are at different stages of development. Governments have been driven by a variety of policy and regulatory objectives ranging from economic factors, the public interest, preservation of cultural diversity to the protection of citizens. Regulatory initiatives may be embedded in existing sectoral legislation such as telecommunications laws and broadcasting codes or horizontal legislation such as data protection laws, consumer protection laws and competition laws. Otherwise, in a number of cases, recognising the unique features of OTT service providers, new regulatory regimes were developed to govern their behaviours.

While growth in Information and Communication Technology (ICT) has been spurred by several factors, one factor stands out from the rest. A very significant portion of the growth in data traffic has been driven by a small number of leading OTT providers. According to regional service providers, as shown in Figure 1, Internet traffic generated by these OTT services in 2021 exceeded the total data traffic generated in 2020 (Axon Partners Group, 2022).

[1] The International Telecommunication Union (ITU) is the United Nations specialized agency for information and communication technologies – ICTs

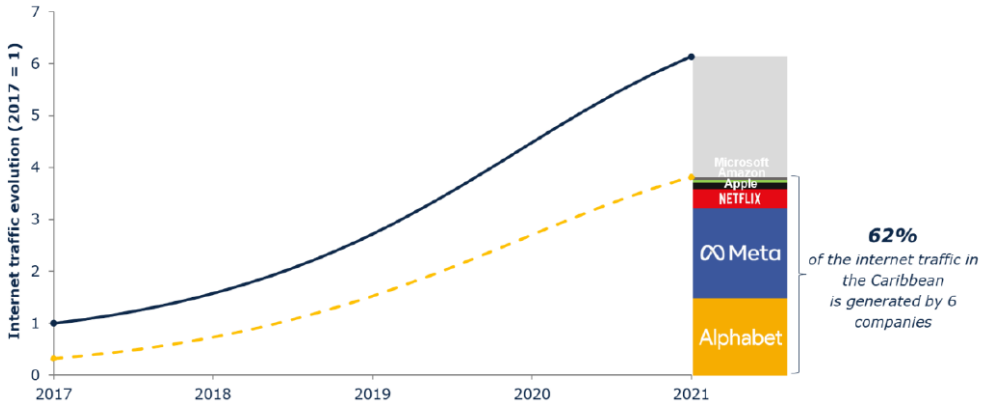

Figure 1: Evolution of Internet Traffic

Source: Impact of OTTs on Caribbean networks and implications of their fair share contribution to countries' development - Axon Partners Group

The Trinidad and Tobago Government has recognised the opportunities the Internet and digital services such as OTTs bring to its citizens. The National ICT Plan (the ICT Blueprint)[2] places emphasis on improving connectivity and modernising the legal and regulatory framework to, inter alia, treat with OTT services. Further, the ICT Blueprint states that the Internet, its governance, and the policies for its use constitute critical success factors in determining the benefits that society derives from ICTs. This follows from the country's broader objectives under the United Nations (UN) Sustainable Development Goals (SDGs), specifically Goal 9 – Industry, Innovation and Infrastructure, geared towards the realisation of the macro-economic objectives articulated in Vision 2030 National Development Strategy[3].

The Telecommunications Authority of Trinidad and Tobago (the Authority) first considered the topic of OTTs in its consultative document *Towards the Treatment of Over-the-Top (OTT) Services (2015)*. That document explored the concept of OTTs and, in particular, sought to examine the interaction between the markets in which OTT service providers and authorised providers operate in Trinidad and Tobago. In addition to evaluating the impact of OTT voice over Internet Protocol (VoIP) services within the industry, the document also aimed to engage the public on pertinent issues relating to OTTs.

[2] The National ICT Plan (2018-2022): https://mpa.gov.tt/sites/default/files/file_upload/publications/ICT%20BLUEPRINT%20JULY%202019.pdf

[3] Vision 2030: The National Development Strategy for Trinidad and Tobago: https://www.planning.gov.tt/sites/default/files/Vision%202030-%20The%20National%20Development%20Strategy%20of%20Trinidad%20and%20Tobago%202016-2030.pdf

In reviewing the feedback received from the public consultation on that document, the Authority noted that many of the comments were heavily focused on the issue of net neutrality. Generally, this term refers to the principle that all Internet traffic should be treated equally, without regard to its content, destination or source. It was, therefore, evident that the treatment of OTT services could be addressed within a larger overarching framework that includes a discussion on the principle of net neutrality. At that time, the Authority took the decision to subsume previous discussions on OTT issues and net neutrality into one document addressing both topics.

In July 2018, the Authority began public stakeholder discussions on the topics of net neutrality and OTT regulation through its consultative document *Discussion Paper on Net Neutrality and OTT Services in Trinidad and Tobago* (the Discussion Paper)[4]. The Authority sought feedback on the document from stakeholders with respect to the proposed guiding principles and regulatory approaches to net neutrality and the treatment of OTT services in Trinidad and Tobago. While both topics were addressed within the Discussion Paper, the document partitioned the treatment of net neutrality principles and OTT regulation, with the former contained in sections 1–8 and the latter exclusively addressed in section 9.

In October 2021, the Authority published the decisions on recommendations (DORs) and the final version of the Discussion Paper. Based on feedback from that consultation process, and considering the dynamism of the industry, the Authority indicated in that document that future consultations on both topics would continue in separate frameworks on net neutrality and OTTs.

The Framework on Net Neutrality in Trinidad and Tobago was published for its first round of consultation in March 2022. This document, *Framework on Over-the-Top Services (OTTs) in Trinidad and Tobago* (the Framework), presents the Authority's recommendations on the treatment of OTT services accessed in Trinidad and Tobago.

1.2 Purpose

This Framework presents the Authority's proposed strategies and recommendations to address OTT services accessed in Trinidad and Tobago. The recommendations shall guide, where applicable, the Authority's future regulations on OTT communications and media services.

[4] This document can be found on the Authority's website: https://tatt.org.tt/DesktopModules/Bring2mind/DMX/API/Entries/Download?Command=Core_Download&EntryId=1540&PortalId=0&TabId=222

1.3 Objectives

The Framework is intended to:

1. present the definition of OTTs adopted by the Authority.

2. outline the policy considerations for OTTs, including challenges and opportunities.

3. examine approaches adopted internationally and their relevance within the local context.

4. present the Authority's short-term and long-term strategies for addressing OTTs within its legislative framework.

5. propose recommendations for the harmonisation of OTT-based policies and regulations at the regional level.

6. explore options for OTT providers' investment within the industry, inclusive of infrastructure and local content development.

1.4 Scope

This Framework addresses the Authority's regulatory approaches for OTT services and presents the Authority's legislative framework and the policies and strategies that relate specifically to this type of service. The Authority recognises an OTT service as content, service or application, accessed by the public via the Internet, that may be a full or partial substitute for, and/or may compete with a public telecommunications and/or broadcasting service.

This Framework focuses on OTT communications (voice and messaging) and OTT media services (online streaming). Further, the regulation of social media and e-commerce platforms is outside the current scope of this Framework and may be addressed in future iterations of this document.

1.5 Legal and Regulatory Framework

The Telecommunications Act Chap 47:31 (the Act)[5] provides the legislative basis for the regulation of OTT services. Section 3 contains the objects of the Act, which include, inter alia, establishing conditions for:

> (a) an open market for telecommunications services, including conditions for fair competition, at the national and international levels;
>
> (b) the facilitation of the orderly development of a telecommunications system that serves to safeguard, enrich and strengthen the national, social, cultural and economic well-being of the society;
>
> (c) promoting and protecting the interests of the public by—
>
> (i) promoting access to telecommunications services;
>
> (iii) providing for the protection of customers;
>
> (iv) promoting the interests of customers, purchasers and other users in respect of the quality and variety of telecommunications services and equipment supplied.
>
> (f) promoting the telecommunications industry in Trinidad and Tobago by encouraging investment in, and the use of, infrastructure to provide telecommunications services; and
>
> (g) to regulate broadcasting services consistently with the existing constitutional rights and freedoms contained in sections 4 and 5 of the Constitution.

Additionally, section 21 (1) of the Act provides the legislative basis for the authorisation of any service that qualifies as a public telecommunications or broadcasting service in Trinidad and Tobago. Section 21 states that: "no person shall operate a public telecommunications network, provide a public telecommunications service or broadcasting service, without a concession granted by the Minister".

Section 21 (2) continues: "a person who wishes to operate a network or provide a service described in subsection (1), shall apply to the Authority in the manner prescribed."

[5] The Telecommunications Act Chap 47:31: https://tatt.org.tt/Portals/0/Telecommunications%20Act%20Chap.%2047.31%20(2022).pdf?ver=2022-03-03-075048-513

Part I of the Act includes definitions for a public telecommunications service and a broadcasting service. A public telecommunications service is defined as: "a telecommunications service, including a public telephone service, offered to members of the general public, whereby one user can communicate with any other user in real time, regardless of the technology used to provide such service." A broadcasting service is defined as: "the offering of the transmission of programmes whether or not encrypted, by any means of telecommunications, for reception by the general public, including sound, radio, television and other types of transmissions, such as those on a point to multipoint basis."

1.6 Review Cycle

This Framework will be revised periodically to meet changing and unforeseen circumstances. The Authority will review the document and, if necessary, make modifications, in consultation with stakeholders, to ensure that the Framework is guided by appropriate policy guidelines and objectives.

Questions or concerns regarding the maintenance of this Framework may be directed to the Authority via email at consultation@tatt.org.tt.

1.7 Consultation Process

In accordance with its *Procedures for Consultation in the Telecommunications and Broadcasting Sectors of Trinidad and Tobago* (TATT 2021) (Consultation Procedures), the Authority sought the views of the general public and stakeholders on this Framework. In August 2022, version 0.3 of the Framework was released for the first round of two rounds of public consultation for a period of eight weeks. The decisions on recommendations (DORs) matrix for the first round of public consultation is attached as Appendix I.

This Framework shall be issued for the second round of consultation. The consultation shall be for a period of at minimum four weeks.

1.8 Other Relevant Documents

Other relevant consultative documents, policies, plans and regulations to be read along with the *Framework on Over-the-top Services (OTTs) in Trinidad and Tobago* include:

1. *Authorisation Framework for the Telecommunications and Broadcasting Sectors of Trinidad and Tobago* (ver. 0.5, 2005)

2. *Consumer Rights and Obligations Policy* (ver. 1.0, 2014)

3. *Discussion Paper on Net Neutrality and Over-the-Top (OTT) Services in Trinidad and Tobago* (ver. 0.2, 2021)

4. *(Draft) Framework on Net Neutrality in Trinidad and Tobago* (ver. 0.3, 2021)

2 Internet Trends and Perspectives

ITU has observed the following four key trends in ICT market development and regulation[6]:

1. The digital age is a data-centric environment.

2. Internet players are breaking down the integration between mobile networks and mobile services.

3. Data provides a significant strategic advantage.

4. There is increasing convergence in communications infrastructure.

Based on these four trends, ITU has noted the following three issues:

1. Digital players operate regionally and globally, whereas the jurisdiction of regulators is limited to national boundaries.

2. Digital players are outside the jurisdiction of regulators.

3. Cooperation and collaboration among stakeholders is crucial at the national and international levels.

Furthermore, in 2020, the Commonwealth Telecommunications Organisation (CTO) recognised the following four regulatory perspectives in relation to OTTs:

1. Evolving business models and technological progress also mean that regulatory tools and institutional arrangements have to change.

2. Regulation needs to be guided by the principles of minimal intervention and proportionality.

3. The regulation of OTTs is a relatively new field and few regulators have issued formal regulations.

4. OTTs may also be under the purview of other regulators outside the telecoms sector, such as cybersecurity and competition. (CTO, 2020)

[6] ITU Academy - Service Quality Regulation: https://academycourses.itu.int/course/view.php?id=1283

Based on the trends observed by ITU, and the perspectives recognised by the CTO, it is essential to adopt a data-driven approach to policy formulation, especially considering the dynamic nature of the ICT industry and, more specifically, the evolving nature of OTTs.

The proliferation and adoption of OTTs is closely associated with the growth of the Internet and the availability of mobile broadband services. According to the Authority's Annual Market Report[7] 2022, Trinidad and Tobago's total Internet subscriptions[8] in that year stood at 1,248,000. This represents a 5% increase from the previous year. With the exception of 2018 and 2019, there has been continuous growth in subscriptions in the local Internet market over the past 15 years, illustrating the increasing demand for Internet services and applications.

From a purely demand-side perspective, the National Digital Inclusion Survey 2021[9] (DIS 2021) showed that a significantly high proportion of the local population (83%) reported that they used OTTs. For persons using OTTs, 79% access the services on a daily basis. The median time in minutes spent calling and messaging using OTT applications generally, and on Wi-Fi specifically, were 30 and 45 minutes, respectively. According to DIS 2021, the highest reported advantage of OTTs compared to mobile and SMS was better quality of connection particularly through a Wi-Fi connection, perceived by the respondents. These figures in DIS 2021 show the growth in demand and use of OTTs in Trinidad and Tobago, as well as the need for an orderly and structured approach to market expansion.

2.1 Global Trends in Including OTTs in Legislative Frameworks

The emergence of new technologies and services enabled by the Internet has triggered specific questions on the applicability of existing legislative frameworks. Countries are in varying stages of incorporating OTT communications and media services within their legislative and regulatory frameworks. Several jurisdictions, including Australia and the European Union (EU), have amended their frameworks to explicitly incorporate OTT services.

[7] Annual Market Report: https://tatt.org.tt/ReportsPrices/AnnualMarketReport.aspx

[8] Total Internet subscriptions are the sum of fixed Internet subscriptions and active mobile Internet subscriptions.

[9] National Digital Inclusion Survey 2021: https://tatt.org.tt/DesktopModules/Bring2mind/DMX/API/Entries/Download?Command=Core_Download&EntryId=1628&PortalId=0&TabId=222

2.1.1 Australia

In 2018, the Australian government approved the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill. The Bill was introduced in response to the increasing challenges posed by new technologies. It extends regulatory enforcement assistance obligations to a new category of regulated entity, namely, "designated communications providers". This captures any providers of communications services and devices in Australia, irrespective of where they base their operations, and includes providers of electronic services software/suppliers, and equipment and device manufacturers.

2.1.2 Bahrain

In 2020, the Telecommunications Regulatory Authority of the Kingdom of Bahrain issued for consultation its *Position Paper on the Licensing Approach to IP-Based Voice and Messaging Services in the Kingdom of Bahrain.* The document clarified that under the Internet Service Provider Licence, the prohibition on providing "basic voice services" includes Number-based Services and does not extend to Number-Independent Services. The paper also confirmed that provisions of the *Telecommunications Law* apply to all Number-Based Service providers irrespective of the jurisdiction of their establishment and the location of their technical equipment, if they effectively, deliberately, and purposefully direct their activities to residents of the Kingdom of Bahrain.

2.1.3 Brazil

Under the current Brazilian legislation, OTT services and applications are classified as value-added services (serviço de valor adicionado or SVA) and are not considered as either telecommunications or broadcasting services.

2.1.4 Canada

In February 2022, the Canadian government introduced a new bill to amend the Broadcasting Act and to make related and consequential amendments to other acts, such as the Online Streaming Act which received Royal Assent on 27th April 2023. The aim of the Online Streaming Act is to expand the authority and powers of the Canadian Radio-television and Telecommunications Commission (CRTC), and it will bring online broadcasters – including online streaming platforms – under the same regulatory framework as traditional broadcasters providing services and content in Canada.

Although the CRTC has recognised that new media digital and Internet content delivery platforms do fall within the definition of "broadcasting" for the purposes of the Broadcasting Act, it exempted these platforms from broadcast licensing and regulation through the promulgation of successive digital media exemption orders. These amendments to the Broadcasting Act are also aimed at creating more opportunities to showcase and support Canadian content, by granting the CRTC the power to require online broadcasters and OTT platforms to make financial contributions in support of Canadian creators and programming, similar to already existing arrangements with traditional broadcasters.

The Online Streaming Act contains the following key amendments to the Broadcasting Act:

1. Regulating online service providers: the Online Streaming Act would make "online undertakings" a defined class of broadcasting undertakings under the Broadcasting Act, which would give the CRTC the explicit authority to require online services, including OTT platforms, to promote and contribute further to the creation of Canadian content.

2. Canada's broadcasting policy: the broadcasting policy established in the Broadcasting Act is updated to be more inclusive of all Canadians.

3. Regulatory approach: the Online Streaming Act grants the CRTC more expansive powers to impose new regulations on various classes of broadcasting undertakings.

2..1.5 The European Union (EU)

Over the past two decades, OTTs have developed outside the EU's legal framework for electronic communications, which was not designed to regulate non-traditional TSPs. Further, the European framework relied on an established set of directives which was implemented through EU Member States' local laws, following various approaches. In 2018, however, the EU issued its European Electronic Communications Code (EECC) which expanded the definition of electronic communications services (ECS) to include OTTs.

The new definition includes three categories of ECS: Internet access services; services which wholly or mainly consist of the conveyance of signals; and interpersonal communication services (ICS). ICS are further divided into number-based and number-independent services. A service is number based if it connects or enables communication via the PSTN. A service is number-independent if it does not connect or enable communication with publicly assigned numbers.

This new set of obligations was to have been implemented in all EU Member States before 21st December 2020. However, delays were experienced due to the COVID-19 pandemic. As of 2022, eight countries (Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary and Italy) have implemented the new framework in their national laws. In the remaining EU countries where the EECC is not yet implemented, the national regulators are requiring OTT operators, especially those who use the publicly assigned numbering resources of their country, to register and comply with regulatory requirements.

2.1.6 The United States

The US classifies OTTs as information services under the Communications Act and, therefore, they are deregulated, with the exception of some requirements. Information services are, therefore, not subject to regulation similar to telecommunications services.

The existing regulations for OTTs are as follows:

1. Communication OTTs: an obligation to offer free 911 emergency calls; facilitate numerical portability; notify if a 911 message has not been sent; allow intercepting calls under the request of security or intelligence forces; and issue notices of promotions and discounts.

2. Audio-visual OTTs: an obligation to include subtitles to video content for persons with hearing impairments. Some states levy a tax on these OTTs.

3. Music OTTs: an obligation to report the payment of royalties or intellectual property ownership rights.

While OTTs are subject to federal consumer and privacy protection laws, there is no harmonised regulatory framework that imposes specific regulatory restrictions and obligations to the same extent as those of the TSPs.

2.2 Global Trends in OTT Investment in Infrastructure

Global increases in digital consumption have spurred exponential growth in data traffic. Some market analysts estimate that this is largely due to the use of OTTs (ITU, 2020). The increase in traffic has resulted in additional investment requirements for network upkeep and expansion. While these investment obligations have generally rested with telecommunications providers, it is now recognised that the nature of infrastructure demand and deployment is shifting (ITU, 2020). Growing traffic demands necessitate intensive and sustainable investment in broadband infrastructure. This, in turn, requires a shift in investment models driven by the major beneficiaries

of the infrastructure. Thus, OTT providers are increasingly being called to augment their investment in network infrastructure, as they benefit substantially from network connectivity.

Different approaches have been adopted by various TSPs to quantify costs for mobile and fixed networks. In both cases, cost calculation revolves around a common concept: the determination of incremental costs. These represent the costs incurred by TSPs just to serve the additional volume of traffic. In other words, incremental costs represent the costs that would be saved if OTT-driven traffic were no longer generated. Regional TSPs have calculated that OTT-driven costs for mobile networks as the product of the three variables identified in Figure 2, incremental cost per GB, annual data traffic and the share of OTT traffic. The end-result is therefore a purported estimated cost of between $201 and $268 million per year in the Caribbean region.

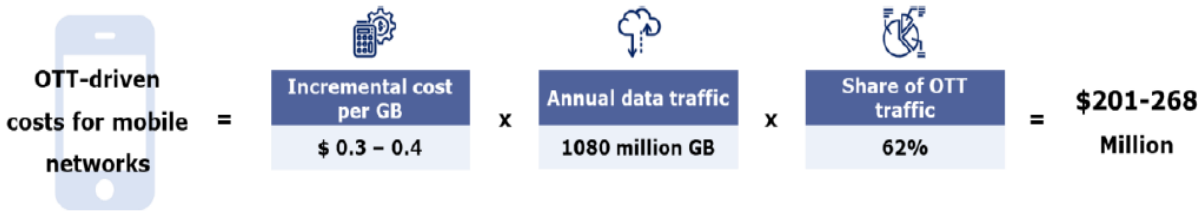

Figure 2: Quantification of the OTT-driven costs for mobile networks in the Caribbean Region

Source: Impact of OTTs on Caribbean networks and implications of their fair share contribution to countries' development - Axon Partners Group

A report by The Working Group for 21st Century Financing and Funding Models for Sustainable Broadband Development also recommends governments and policy makers look towards digital platforms in their efforts to broaden the contribution base to support sustainable broadband development. The report notes, "governments and policy makers should be aware of existing case studies and the benefits of contributions and investments from such players and ensure a mutually rewarding collaboration with them" (The Working Group for 21st Century Financing and Funding Models for Sustainable Broadband, 2021).

Similarly, there is a growing focus in many jurisdictions on engaging OTT providers to invest in local media content creation and investment. As OTT services grow in prevalence and popularity, investment requirement strategies are adopted to safeguard access to content with local cultural relevance.

2.2.1 The EU Case Study: Fair and Proportionate Contribution

A 2022 study from Frontier Economics has estimated that delivering OTT traffic over European telecommunications networks results in a €36 billion to €40 billion annual cost to telecommunications providers (Frontier Economics, 2022). Telecommunications providers have argued that OTTs' contributions towards this cost are necessary to ensure the long-term sustainability of networks. The European Commission has affirmed in its declaration on *European Digital Rights and Principles* its commitment to "developing adequate frameworks so that all market actors benefiting from the digital transformation assume their social responsibilities and make a fair and proportionate contribution to the costs of public goods, services and infrastructures".

In March 2022, the European Commission announced its plans to present a legislative initiative to make content-heavy platforms contribute to the cost of telecommunications networks. This followed advocacy by European network operators who had called on EU policymakers to align Europe's digital ambitions with a supportive policy and regulatory ecosystem, in which "big tech" platforms also contribute fairly to network costs.

This 'fair share' proposal has sparked a fierce debate, with big telcos, southern European Member States, some Members of the European Parliament (MEPs) and members of academia supporting the idea, and other telcos, big techs, northern European Member States and some MEPs arguing against the detrimental effects such an initiative could lead to and favouring a special fund, in the event of a compensation mechanism being introduced.

Further, the defenders of 'fair share' insist that the principle of net neutrality would not be damaged, as the compensation mechanism would not involve a differentiated traffic management or unequal treatment of data traffic. They also point to other possible alternatives such as the setting up of a special fund as potentially controversial, given the difficulties to establish and run a fund as well as the potential of its mismanagement for other uses, or the uncertain relationship of such a fund with an already existing Universal Service Fund.

2.2.2 The United States Case Study: Contributions to Universal Service Fund (USF)

In May 2022, the Senate Commerce Committee submitted to the full Senate, the Funding Affordable Internet with Reliable Contributions Act or the FAIR Contributions Act[10]. The FAIR Act which is still in the legislative approval stage, directs the Federal Communications Commission (FCC) to study the feasibility of collecting fees from "edge providers" such as

[10] FAIR Act: https://www.wicker.senate.gov/services/files/14673D18-8191-4442-8BF1-6316E66CC0D6

YouTube, Google and Netflix. It directs the FCC to issue a Notice of Inquiry and seek public comments on, inter alia, the following areas:

1. The class and size of firms subject to contributions requirements

2. The equity issues of the current contributions system

3. The broadband requirements, such as bandwidth and latency, of a particular online service

4. Practical issues concerning the calculation of contributions and the logistics of collection.

5. The effect such a change would have on the sustainability of the American USF and how to ensure that disbursements from it are consistent and predictable over time

Co-sponsor of the FAIR Act, Senator Shelley Moore Capito, in describing the purpose of the FAIR Contributions Act, stated:

"For too long, Big Tech has been able to profit off the critical infrastructure used for common day-to-day activities while not helping at a sufficient level to improve those capabilities with broadband investment in states like West Virginia. With communications platforms moving away from telephone networks toward internet heavy platforms, it's important now more than ever that we start looking at ways that Big Tech can step up and help close the digital divide and secure true universal service for West Virginians. Our legislation is a solid first step in working toward this goal and making this a reality."

As of March 2023, the main provisions of the FAIR Contributions Act include[11]:

1. Direct the FCC to issue a Notice of Inquiry seeking public comment on the feasibility of collecting USF contributions from internet edge providers, and issue a final report on the matter within 180 days.

2. Require the FCC to consider:

    i. Possible sources of Big Tech revenue, such as digital advertising and user fees;
    ii. The fairness of the current system and a system under which contributions could be assessed on Big Tech firms;
    iii. The feasibility of assessing contributions on such a broad category of firms that do not currently register with the FCC;

[11] https://www.wicker.senate.gov/2023/3/wicker-luj-n-young-kelly-reintroduce-bill-to-explore-collecting-usf-contributions-from-big-tech

iv. The effects such a change would have on Tribal, low-income, and elderly consumers; and
v. The changes to current law necessary to implement this system.

2.2.3 South Korean Case Study: Recovery through Network Charges

In 2020, South Korea's President and the Parliament recognised that both content and broadband providers have a responsibility to ensure the quality of data and that growing Internet traffic requires the provision of additional capacity, the cost of which is not free.

A network operator, SK Broadband, has issued a policy requiring that content providers generating 1% or more of total Internet traffic on their network, or those with one million or more users, pay a fee to ensure the provision of network capacity. The policy has received backlash from Netflix who claimed that it has no obligation to negotiate or pay for the use of South Korean networks.

In 2021, SK Broadband sued Netflix, after the platform's popular show "Squid Game" led to a surge in network traffic. SK Broadband asked Netflix to pay associated maintenance costs resulting from the spike in network traffic. The Seoul Central District Court ruled that Netflix should pay network usage fees to, and negotiate with, SK Broadband.

In 2020, the Korea Communications Commission issued its "Guidelines on Fair Internet Network Use Agreement". The Guidelines, which are applicable to agreements on the use of the Internet between an ISP and a content provider, served as reference for any disputes that may arise. The Guidelines are meant to prevent unfair discrimination between large companies and small and medium-sized enterprises in Korea and abroad, and to minimise the risk of potential damage to users at the end of Internet network use contracts.

South Korea further launched the 'cost recovery regime' in February 2022, by which the Ministry of Science and ICT require the largest content providers to engage with broadband providers for compensation. Compensation is determined by the parties and is private. This regime relies on the Service Stabilisation Act enshrined in Article 22.7 of the Telecommunications Business Act. The government does not set price levels or mandate fees. The Act only applies to providers that have at least 1 million users per day and account for at least 1% of the country's traffic.

2.3 Global Trends in OTT Contribution to Local Content Investment

Local content has considerable value in promoting the heritage and culture of a nation. As streaming services grow in popularity, countries are faced with the challenge of preserving local

cultural representation and content in media consumption. In response, some countries have implemented regulations on OTT media services to incentivise or require the provision of local programming. These regulatory initiatives may take the form of catalogue quotas, direct investment and/or levies.

2.3.1 Australia Case Study

The Australian government has requested that larger OTT providers report to the Australian Communications and Media Authority on their investment in Australian content, commencing from 1st January 2021. Based on the conclusion of various inquiries, the government is examining whether to introduce an Australian content-spending obligation on streaming video on demand (VOD) services above a minimum size threshold in the Australian market.

Although the federal government has extensively studied the sector, it has yet to propose a working mandate that would require the OTT providers to invest locally.

2.3.2 Canada Case Study

A proposed C-10 bill to update the Broadcasting Act 1991 would empower and give flexibility to the national regulator, CRTC, to require investment, as necessary to meet policy goals, by an individual broadcaster or OTT provider, or a class of providers, for the purposes of:

1. Developing, financing, producing or promoting Canadian audio or audio-visual programmes to be provided by broadcasting or VOD services

2. Supporting, promoting or training Canadian creators of audio or audio-visual programmes to be provided by broadcasting or VOD services

3. Supporting participation by parties representing the public interest in proceedings before the CRTC under the Broadcasting Act 1991

The CRTC may define how the investment should be calculated by reference to CRTC's policy objectives for the Canadian broadcasting market. The CRTC may also permit or mandate that such investment be paid to another organisation or fund.

2.3.3 France Case Study

France is currently considering a bill implementing the 2018 revision of the Audiovisual Media Services Directive (AVMSD). Under the proposals, direct investment rules which already apply to linear services would be extended to foreign linear services targeting France. Under the

investment requirement, OTT media providers are required to directly invest a percentage of revenues made in France in the production of works established in or targeting France. This requirement applies above a minimum threshold, based on turnover, audience, and number or share of film and audio-visual works made available to the public.

The investment must be made directly in European cinematographic and audio-visual works, in the form of acquisitions, or production or co-production investment, with a sub-quota for national independent productions with a defined window of exclusive producer rights, to ensure that most investment is not in-house production. At least 20% of the investment must be in programmes and at least 20% in film.

3 Definition of an OTT Service

The terms "OTT" and "OTT services" encompass a broad category of services that are offered over the Internet. In this Framework, the scope of OTTs mirrors ITU's, which focuses on "an application accessed and delivered over the public Internet that may be a direct technical/functional substitute for traditional international telecommunication services" (ITU 2019). These OTT services may substitute or supplement traditional telecommunications services.

The Organisation for Economic Co-operation and Development (OECD) Communications Outlook 2013 has described OTT services as "video, voice and other services provided over the Internet rather than solely over the provider's own managed network" (OECD 2013). Similarly, the Caribbean Association of National Telecommunications Organizations (CANTO) has described OTTs as "a general term used for services that a customer may use which rides on top of a network to which the customer is connected" (CANTO 2017).

The Body of European Regulators for Electronic Communications (BEREC) defines OTT service as "content, a service or an application that is provided to the end user over the public Internet" (BEREC 2016). The CTO, noting the limitation of the BEREC definition, stated that "ideally, an OTT definition is based on a taxonomy that separates out issues that need be addressed by different regulators". They proposed a refined definition that distinguishes between OTTs "that are electronic communication services (OTT-ECS), those that potentially compete with electronic communication services (OTT-Com), those that potentially compete with broadcasting services (OTT-Content) and those that neither compete with electronic communication services nor broadcasting services (OTT-Other)" (CTO, 2020).

For the purposes of this Framework, and considering the definitions above, and ITU's in particular, the Authority shall utilise the following definition of an OTT service:

> Content, service or application accessed by the public via the Internet that may be a direct substitute for, and/or may compete with, a public telecommunications and/or broadcasting service

The scope of this Framework shall be limited to OTT communications (voice and messaging) and OTT media services. It does not include Internet radio broadcasting services, which are covered under the *consultative Framework on Internet Radio Broadcasting Services in Trinidad and Tobago.* (September 2022).

Statements on OTT Definition

1. *For the purposes of this Framework the Authority shall adopt the following definition of an OTT service:*

   Content, service or application, accessed by the public via the Internet, that may be a full or partial substitute for, and/or may compete with a public telecommunications and/or broadcasting service

2. *The scope of this Framework shall be limited to OTT communications (voice and messaging) and OTT media services.*

3.1 OTT Classifications under the Existing Telecommunications Act

Similar to other jurisdictions, Trinidad and Tobago is in the process of assessing the relevance of existing legislation to OTT providers. There is the prevailing question of whether, and to what extent, do OTTs fall within the scope of the Act. This is a complex issue and requires analysis of specific OTTs, or classes of OTT services, in relation to the definitions contained within the Act and the rights and obligations derived from the Act. Even under the umbrella of OTT communications and OTT media, a wide variety of services, with different features and business models, exists. The differences between these services will inform the applicability of the existing regulatory framework to these services and the need for immediate regulation.

Another notable issue is the fact that an OTT service may offer a number of integrated features, some of which may fall under traditional telecommunications-type regulation while others may not. This, among other issues, was brought to the European Court of Justice (ECJ) for a determination. One of the questions to the ECJ was whether the legal classification of the SkypeOut[12]feature would be affected if account was taken of the fact that the primary service Skype can be used as a standalone service. The ECJ considered the distinct purpose and the autonomous operations of the SkypeOut feature in declaring it a regulated telecommunications service, despite the additional features of the main service.[13]

In classifying OTT services with different integrated features, the Authority shall give considerations to the findings of the ECJ in this regard, including consideration of the nature and purpose of additional features of the service.

[12] SkypeOut is a feature which allows users to make calls from a terminal to a fixed or mobile phone line, using the VOIP technology.

[13] CJEU Case C 142/18, Skype (2019) EU:C:2019:460 (Skype Judgement) para 43

Statements on OTT Classifications under the Existing Telecommunications Act

3. *In classifying OTT services with different integrated features, the Authority shall give considerations to the findings of the ECJ, including consideration of the nature and purpose of additional features of the service.*

3.2 Types of OTT Services

3.2.1 OTT Voice Services

OTT voice services are a VoIP offering which uses an Internet connection to offer a voice service by a third party that is independent from the Internet service provider (ISP). There are two main variations of OTT VoIP services, which include those enabling app-to-app connectivity and those enabling app-to-public switched telephone network (PSTN) connectivity.

3.2.2 OTT Messaging Services

OTT messaging services are similar to OTT voice services, as they rely on IP technology to provide instant messaging services to consumers over the Internet. These services may act as an alternative to the short messaging services (SMS) and multi-media messaging services (MMS) provided by authorised telecommunications mobile operators.

OTT voice and messaging services are typically offered as a combined service, referred to as OTT communications.

3.2.3 OTT Media Services

OTT media is described as the delivery of video and/or audio via the Internet, without a cable TV or satellite service operator being involved in the control or distribution of the content itself. The content arrives from a third party and is delivered to an end user's device, with the ISP responsible only for providing the transport medium for the IP packets.

4 Policy Considerations for OTT Services: Challenges and Opportunities

OTT providers and services now form part of the Internet's ecosystem. Consumers and businesses have benefited significantly from their entry through cheaper communications and expanded media choices. As ITU notes, "OTTs offer essential economic and social features beyond traditional communications services, helping an entire ecosystem to take root and expand in the new digital economy" (ITU, 2020).

The prevalence of OTTs has raised several public policy concerns. These include their potentially adverse effects on competition and consumer rights (See sections 4.1 and 4.2.). At the same time, there are also economic opportunities to be realised from OTTs inclusion within the market. These include collaborative initiatives between OTT providers (section 4.3) and network providers and OTT providers' investment in sector development and network infrastructure (section 4.4).

4.1 OTTs and Competition Concerns

A key challenge of OTTs entry within the market is determining whether fair competition conditions are being upheld. Notwithstanding their different business models, telecommunications service providers (TSPs) and OTT providers may be in direct competition with each other where, from the consumer's point of view, they provide equivalent services.

This raises a concern of whether an OTT provider maintains a competitive advantage over a TSP given the differences between both providers' regulatory obligations and restrictions. For example, as opposed to their OTT counterparts who currently bear minimal obligations, TSPs must fulfil regulatory requirements in areas such as licensing, quality of service (QoS) and consumer protection. Similarly, their actions may be subject to more stringent competition assessments than that of OTT providers.

Given their different regulatory obligations, this has sparked numerous debates as to whether the differences breed unfair competition in the market-place. It is argued that the combined effect of these regulatory disparities is to distort the playing field between digital and traditional players.

Conversely, some industry experts remain dissuaded that a regulatory imbalance between TSPs and OTT providers exists. They contend that there is a marked difference in the services provided by traditional and digital providers, both in the control of the underlying infrastructure, and regarding consumer use and perception of the services (Mohit, 2021). There is therefore merit in assessing the nature and function of these services to determine whether they are in the same

relevant markets as traditional telecommunications services. Where these services are different, a different regulatory framework may be warranted.

4.2 OTTs and Consumer Impact

OTTs offer significant economic and social benefits to consumers. One of these is the perceived cost advantages of cheaper communications options. For example, with respect to voice calls, OTT substitutions are often associated with savings on local and long-distance calls and roaming charges. Secondly, with the proliferation of OTTs, consumers are offered an increased choice of services which best fit their needs. Personalised content, such as online video-on-demand sites, allows users to customise their media consumption. Consumers also enjoy additional features of the services, such as video calling, further driving demand. This demand has been associated with increased connectivity, social engagement and economic activities.

Through OTTs, citizens benefit from digital solutions which reduce barriers to commerce and trade development. In some countries, OTTs provide economic opportunities amongst rising unemployment rates. For example, in Côte d'Ivoire, online businesses created new trade axes with countries such as China, Morocco, Togo, Turkey and the United Arab Emirates, resulting in increased sales of their products. Additionally, OTTs boost entrepreneurial opportunities for craftsmen, merchants and young persons, by providing a marketplace for the "gig economy" (ITU, 2020).

As OTTs grow in popularity, however, there is a concern that their disruptive effects and unregulated presence may result in diminished consumer protection. This concern is particularly relevant in areas of data protection and consumer privacy. One of the Authority's mandates is to promote and protect the interests of consumers. To ensure that the rights and safety of users are upheld, it may be necessary to apply policies and regulations in areas pertinent to OTTs. For instance, it may be necessary to implement laws to ensure that OTTs' service provisions safeguard consumer privacy, security and safety.

4.3 Collaborative Opportunities between OTTs and TSPs

Collaborative opportunities exist between OTT providers and TSPs, particularly network providers. With the prevalence of OTTs, many TSPs have turned to data-centric business models, i.e., business models in which mobile operators have decreased their reliance on voice and SMS charges, and have turned towards data services for growing revenues and opportunities. One ITU study report noted that this shift has resulted in benefits such as reduced churn rates, increased net

promoter scores, more stable in-bundle revenue streams, and the ability to link returns more directly to network investment (ITU, 2020). The study also addressed the symbiotic relationship between OTTs and network providers noting the collaborative initiatives and opportunities that exist between the parties.

There are also technical and economic benefits of a TSP-OTT collaboration in relation to managing service quality[14]. OTT services and, in particular, multimedia applications, are highly data intensive and require significant network resources for their optimal delivery. Where TSPs and OTT providers act in isolation, end users may experience compromised QoS, since both parties control parameters impacting the delivery of the service. Thus, a TSP-OTT collaboration may offer a mutually beneficial solution, resulting in increased revenues and improved market positioning for both parties due to the enhanced quality provided to customers.

Other areas for economic partnership identified by ITU include:

1. the bundling of value-added services – including OTT music or video streaming services in operator packages – which can generate new revenues, as well as increase data usage.

2. rich communications services (RCS) – the next generation of SMS – enabling business-to-business-to-consumer (B2B2C) revenues from businesses interacting with consumers through carrier channels.

3. carrier billing, which enables operators to use their strengths in customer and billing relationships to provide billing capabilities for stores, and content and applications providers (CAPs) (ITU, 2020).

Notwithstanding the collaborative opportunities that may exist between OTT providers and TSPs, there exist concerns on asymmetry of bargaining power between both parties in forming mutually beneficial commercial arrangement. This is particularly a concern in smaller states such as Trinidad and Tobago, where internationally based OTTs may not have a registered presence within the country. One of the recommendations of the ITU is that "Member States should encourage mutual cooperation as far as practical between OTTs and network operators, with a view to fostering innovative, sustainable, viable business models and their positive roles in fostering socio-economic benefits."

[14] This term encompasses quality of service and quality of experience.

4.4 OTTs and Industry Investment

In 2019, the global market size for OTT media services alone was valued at US$121.61 billion, and this is projected to reach US$1,039.03 billion by 2027 (Allied Market Research, 2020). As a result of this growth, and the consequential increase in data traffic on the networks, operators are faced with growing pressure to increase investment in their network infrastructure. Pointing to falling revenues in traditional telecommunications retail markets, global industry stakeholders, including policymakers and network operators, have express concerns on the sustainability of current investment models in relation to telecommunications networks. In response, there are calls for OTT providers to contribute to infrastructure investment in a more proportionate and structured manner. In these petitions, it is often highlighted that OTTs whose business models and financial success are enabled through extensive data traffic on the underlying network should contribute to investment in the network.

Similarly, the case is also made for OTT media services to invest locally in the production and development of media content. Noting regulatory inequalities between traditional broadcasters and OTT media service providers, countries including Australia and Canada are reforming their legislations to capture OTT investment in local content. This includes the creation of new laws that require streaming services to invest a percentage of their locally earned revenue in local content, in the form of commissions, co-productions or acquisitions of content.

5 Recommendations on OTT Regulation: Strategy 1 – A Legislative Approach

The nature of technological convergence and the disruptive features of modern-day technology pose challenges to traditional forms of regulation. As markets converge, demands are placed on regulators to adapt and evolve to meet changing business models and requirements. Policies and regulations must continue to protect values such as competition and consumer rights without impeding innovation and economic opportunities. Additionally, increasing responsibilities are placed on regulators to address areas of concern such as cybersecurity, privacy, and data protection.

Notwithstanding emerging areas of focus, the regulatory objectives contained in section 3 of the Act are pertinent to newer forms of communications and media services, such as OTTs. Promoting competition, fostering investment, and protecting consumers remain key mandates of the Authority in this era of digital transformation. As ITU and the World Bank note, "the regulator's traditional areas of responsibilities and institutional design are expected to largely continue in the digital environment." The form should, however, be more flexible and the regulators' mandates and roles may need to be amended to fully capture the new digital realities (ITU and the World Bank, 2020).

5.1 Short-Term and Long-Term Strategies for OTT Regulation in Trinidad and Tobago

Addressing the unique challenges of digital services like OTTs requires a holistic and sustainable approach to regulation. To ensure there are no regulatory gaps, consumers are continuously protected and markets remain competitive, the Authority shall adopt both short-term and long-term strategies for OTT regulation.

In the short-term, the Authority recommends an examination of specific OTT services against the existing legislative framework, to determine whether the OTT service legally falls within the scope of the Act. This entails an assessment of the definitions of the terms "telecommunications services" and "broadcasting services", and the Act's applicability to the OTT service in question. The Authority's interim approach to the classification of these services is addressed in section 5.2.

The Authority recognises that another short-term solution would be to engage in regional initiatives that foster collaboration amongst stakeholders (See sections 5 and 6). The Authority further recognises that, in the long-term, due to the evolving nature of OTTs in the market, there is a need to broaden our legislative frameworks to explicitly provide for the regulation of OTT services.

Statements on Short-Term and Long-Term Strategies for OTT Regulation in Trinidad and Tobago

4. *The Authority shall adopt both short-term- and long-term strategies for OTT regulation.*

5. *In the short-term, the Authority shall conduct an examination of specific OTT services or classes of OTT services against the existing legislative framework, to identify whether the OTT services in question legally fall within the scope of the Act.*

6. *The Authority shall continue its regulatory work to address market changes arising out of technological advancements, to ensure that effective and fair competition is maintained.*

7. *The Authority recognising the importance of effective engagement, shall offer support where applicable in fostering a collaborative framework between OTT providers and TSPs.*

8. *The Authority recognises that there is a need to broaden our legislative frameworks to explicitly provide for the regulation of OTT services.*

9. *A short-term solution would be for the Authority to engage in regional initiatives that foster collaboration amongst stakeholders.*

5.2 The Authority's Interim Approach to OTT Classification

Pursuant to section 18 (1)(b) of the Act, the Authority has the power to classify telecommunications networks and services as public telecommunications networks, public telecommunications services, closed user group services, private telecommunications services, value added services, broadcasting services or any other type of telecommunications service.

The Authority shall assess whether an OTT service, or class of OTT services (that is, OTT services with similar service features and business models) can be classified as a telecommunications or broadcasting service. This assessment will be made based on the criteria contained in the Act's definitions of the terms telecommunications services and broadcasting services, and on the applicability of the relevant provisions in the Act.

5.2.1 Criteria for Determining an OTT Communication Service as a Telecommunications Service

The Authority notes the following three definitions from the Act:

1. Telecommunications includes the transmission, emission or reception of signals, writing, pulses, images, sounds or other intelligence of any kind by wire, wireless, optical or electromagnetic spectrum or by way of any other technology.

2. Telecommunications service means a service using telecommunications whereby one user can communicate with any other user in real time, regardless of the technology used to provide such a service and includes a public telecommunications service, a private telecommunications service, a closed user group service and a radio communication service.

3. Public telecommunications service refers to a telecommunications service, including a public telephone service, offered to members of the general public, whereby one user can communicate with any other user in real time, regardless of the technology used to provide such service.

This section therefore establishes the criteria for making a determination that an OTT communication service is a telecommunications service. In this regard, the Authority shall assess whether an OTT service (or class of OTTs, that is OTTs with similar features) meets the following three criteria listed in the Act's definition of a telecommunications service and public telecommunications service:

1. The service must use telecommunications[15].

2. The mode of telecommunications used must allow users to communicate with any other user in real time[16].

3. The service must be offered to members of the general public[17].

[15] The Act defines telecommunications as: "includes the transmission, emission or reception of signals, writing, pulses, images, sounds or other intelligence of any kind by wire, wireless, optical or electromagnetic spectrum or by way of any other technology". Part of the Authority's assessment shall include a determination of the Internet as a form of telecommunications.

[16] Real-time communications (RTC) are the near simultaneous exchange of information over any type of telecommunications service from the sender to the receiver in a connection with negligible latency. (SearchUnified Communications, 2020)

[17] Refers to all the people of an area, country (Merriam-Webster)

The Authority shall also assess the overall relevance to OTTs of provisions in the existing legislative framework. This entails an assessment on the extent to which the rights and obligations contained in framework, can reasonably apply to the OTT or class of OTTs in question. Specifically, the Authority shall examine, inter alia, provisions within section 22 of the Act, which entails conditions applicable to all concessions, section 24, which entails conditions applicable to a concession for a public telecommunications network or service, section 25, which relates to interconnection, section 26 which relates to access to facilities, section 28, which relates to universal services and section 29 which relates to price regulation. Additionally, section A and C of the Concession shall also be assessed. Consideration shall be given to inter alia, areas such as anti-competitive conducts, QoS, consumer rights, interconnection, access to facilities and universal service obligations.

Based on its assessment, the Authority shall make a determination on whether the OTT service, or class of services, in question can be classified as a telecommunications service requiring authorisation, in accordance with section 21 of the Act. (See section 5.2.3.)

Following its assessment and authorisation, where applicable, the Authority will publish a list of authorised OTT service providers on its website.

5.2.2 Criteria for Determining an OTT Service as a Broadcasting Service

The Act defines a broadcasting service as follows:

> Broadcasting service means the offering of the transmission of programmes whether or not encrypted, by any means of telecommunications, for reception by the general public, including sound, radio, television and other types of transmissions, such as those on a point to multipoint basis.

The Authority shall assess whether an OTT service (or class of OTTs, that is OTTs with similar features) meets the following three criteria listed in the Act's definition of a broadcasting service:

1. The service must offer the transmission[18] of programmes[19] [20].

[18] ITU defines transmission as "the transfer of information from one point to one or more other points by means of signals".

[19] Concession D3 states that "the programming transmitted by broadcasting services may include information, entertainment, advertisements, announcement or any other material as the concessionaire may determine in compliance with this concession."

[20] Whether or not encrypted

2. The service must be delivered via the use of telecommunications.

3. The service must be offered for reception by the general public.

The Authority shall also assess the overall relevance to OTTs of provisions in the existing legislative framework. This entails an assessment of the extent to which the rights and obligations contained in the Act and detailed in section A and section D of the Concession can reasonably apply to the OTT or class of OTTs in question.

Specifically, the Authority shall examine, inter alia, provisions within section 22 of the Act, which entails conditions applicable to all concessions, and section 23 which relates to conditions applicable to a concession for a public telecommunications network or service. Additionally, section A and D of the Concession shall also be assessed. Consideration shall be given to inter alia, areas such as advertising and announcements, intellectual property rights (IPR), content regulation and consumer rights.

Based on its assessment, the Authority shall make a determination on whether the OTT service, or class of services, in question is classified as "a broadcasting service" and requires authorisation, in accordance with section 21 of the Act. (See section 5.2.3.)

Following its assessment and authorisation, where applicable, the Authority will publish a list of authorised OTT service providers on its website.

5.2.3 Authorisation of OTT Communications and Media Services

Section 21 of the Act requires a person who provides a public telecommunications or broadcasting service to apply for approval in a manner prescribed by the Authority. The Authority evaluates and recommends the award of a concession in accordance with the relevant classification identified in its Authorisation Framework.

Currently, the provision of a public telecommunications service and a broadcasting service requires a service-based concession, in the form of a Type 4 and 5 Concession, respectively. The Authorisation Framework also addresses a class concession regime for classes of concessionaires that warrant a lighter regulatory framework. The Authority shall consider the principle of proportionate regulation and the extent to which OTT services classified under sections 5.1.1 and 5.1.2 of this Framework can pragmatically be regulated under a general authorisation regime.

The Authority shall adapt its Authorisation Framework to specify new classifications for OTT communications and media services, where applicable.

Statements on OTT Classifications

10. *The Authority shall assess whether an OTT service (or class of OTTs, that is OTTs with similar features) meets the three criteria listed in the Act's definition of a telecommunications service and public telecommunications service:*

    a. *The service must offer the transmission of programmes .*

    b. *The service must be delivered via the use of telecommunications.*

    c. *The service must be offered for reception by the general public*

11. *The Authority's assessment of OTT services will be made based on the criteria contained in the Act's definitions of the terms telecommunications and broadcasting services and the applicability of the relevant provisions contained in the Act.*

12. *The Authority shall adapt its Authorisation Framework to specify new classifications for OTT communications and media services, where applicable.*

5.2.4 Consumer Privacy and Data Protection

Governments across the world have increasingly taken a human rights-based approach to consumer protection and data privacy. Privacy is a fundamental human right which underpins key values such as freedom of association and freedom of expression. This justification for regulatory intervention is certainly no less valid for Trinidad and Tobago, especially in light of the increasing monetisation of personal data by OTT service providers in other jurisdictions.

Further, across the globe, regulatory interventions as it pertains to the consumer have been driven by the non-economic rationale of supporting individual well-being to mitigate problems involving child pornography, cyber-bullying, sale of personal data, data breaches, and many other online harms. Currently, some of the broad regulatory interventions include legislated notice and take down; transparency reporting; complaints mechanisms; co-regulation; education and digital literacy initiatives; criminalising specific types of online content; filtering / ISP level blocking; and duty of care obligations have been employed in other jurisdictions.

In this regard, the Authority has a legislative duty of care to encourage service providers to be more proactive in protecting and responding to safety risks on their services. As such, pursuant to section 3(c) of the Act, the relevant policies and regulations will be applied in areas pertinent to OTTs to promote and protect the interests of consumers.

Statement on OTTs and Consumer Protection

13. *Pursuant to section 3(c) of the Act, the relevant policies and regulations will be applied in areas pertinent to OTTs to promote and protect the interests of consumers, where applicable.*

14. *The Authority shall undertake consumer awareness campaigns to promote the safe and secure use of OTT services.*

5.3 Amendments to the Legislative Framework to Incorporate OTTs

Technological and market evolution has necessitated major reforms in the legislative frameworks governing the traditional telecommunications and broadcasting sectors. The increasing convergence of these sectors with ICT technologies and services highlights the need for new definitions and regulatory frameworks to address the unique challenges of the digital environment.

To effectively cover the full spectrum of communications and audio-visual media services, the Authority recommends that the legislative framework be broadened to explicitly provide for OTTs. Furthermore, terms and definitions should be updated to current and technology- neutral terms. For example, replacing the term “public telephone service” with “voice communications service” or “broadcasting service” with “audio/visual media service”.
To address the transnational nature of these services, the amended Act should clarify the remit of the Authority over all entities providing OTT services in Trinidad and Tobago, irrespective of their place of establishment or residence.

Further, forbearance provisions within the legislative framework should be extended to allow the Authority broader discretion in applying regulatory tools, such as pre-approval of working agreements and limitation of liability clauses.

Data protection and privacy and confidentiality provisions may also be strengthened to ensure consistency with emerging international standards and industry best practices. The ITU has recommended that data protection and privacy mechanisms include conditions for access to, and use of, consumers’ personal data; procedures for data collection and processing. The limitations

of consumers' right to privacy should also be stated. Consumers should also have access to a variety of customer support services such as live chat support, e-mail, phone, and self-service knowledge support channels (ITU, 2021). As these areas fall under the purview of other authorities and legislations, collaboration may be required.

The codification of the above areas would establish greater specificity and provide legal clarifications, where applicable, within the legislative and regulatory frameworks.

Statement on OTT Communication Regulation

15. To effectively cover the full range of communications and audio-visual media services, the Authority's legislative framework will be broadened to explicitly provide for OTTs, where applicable.

5.4 OTT Media Content Regulation

The Authority is tasked with guiding the development of the broadcasting sector in a manner to safeguard, enrich and strengthen the national, social, cultural and economic well-being of the society. The Act requires that the Authority regulate the provision of broadcasting services in a manner that is consistent with sections 4 and 5 of the Constitution.

Further, the Authority is guided by the *National Policy on Broadcast and the Broadcasting Industry* (the National Broadcast Policy). This policy recognises the rights and freedoms enshrined in the Constitution and the need for freedom of expression and plurality in broadcasting. The National Broadcast Policy also identifies the challenges posed by the Internet and technological convergence, especially since the Internet transcends all national boundaries and is accessible via diverse technologies. With this in mind, the National Broadcast Policy seeks to protect and promote the interests of the broadcaster, the consumer and the other stakeholders involved in the broadcasting industry.

As OTT media services continue to grow and develop, a sustainable approach to regulation is needed to ensure sector development and fair competition in Trinidad and Tobago. In addition to the National Broadcast Policy, the Authority is guided by the *Draft Broadcasting Code for the Republic of Trinidad and Tobago* (the Code). The Code is built on the framework of rights contained in the Constitution, and creates a regulatory framework designed to enable the Authority to balance the conflicting rights and interests of stakeholders while promoting acceptable standards through the introduction of protective provisions. Some of the primary public policy areas highlighted include the protection of national security; the prevention of crime and disorder;

territorial integrity; public safety; the protection of health or morals; and the reputation or rights of others.

To ensure audiences remain adequately protected regardless of the platforms on which they consume content, the Authority recommends expansion of the Code to include OTT media services.

Statements on OTT Media Content Regulation

16. *To ensure consumers remain adequately protected regardless of the platforms on which they consume content, the Authority will ensure that OTT providers' media content comply with the relevant sections of the Constitution and the National Broadcast Policy.*

17. *Based on the continued growth and development of OTT media, the Authority will broaden the scope of the National Broadcast Code to include OTT media services.*

6 Recommendations on Jurisdictional Challenges: Strategy 2 – Regional Harmonisation

The growing globalisation of markets and sectoral convergence has called for greater international and inter-governmental cooperation and collaboration. As ITU notes, this is integral to ensuring that regulatory frameworks can adapt and respond to emerging regulatory challenges (ITU, 2022).

A notable emerging challenge facing regulators is the transnational nature of OTTs. Regulators must address the fact that, while OTT services are accessed within their jurisdictions, the providers are often domiciled outside of them. As ITU notes, transnational digital platforms often use base erosion and profit shifting (BEPS) practices that enable taxes to be paid in low-tax jurisdictions rather than where economic activity occurs (ITU and the World Bank, 2020).

Another ITU report highlights the challenge of imposing equitable and harmonized taxation regimes and other rules on global online service providers, especially for smaller states (ITU, 2018). The report recommends "an approach of continuing to monitor and putting in place legislative mechanisms and international co-operative forums so regulators have the ability to further regulate online services (even if they currently choose not to)". This includes strategies such as facilitating the partnering between online service providers and network operators, and putting in place fair and equitable taxation arrangements. It also involves establishing regional agreements among countries, so that joint action can be taken at that level, thereby enhancing the negotiation and enforcement capacity of each state.

Further, a Working Group report for the Broadband Commission for Sustainable Development highlighted ongoing reform efforts by the Organisation for Economic Co-operation and Development (OECD) to address the jurisdictional challenges of multinational companies earning revenues in countries where they do not have a physical presence. This includes efforts to "correlate, fairly and reasonably, value capture per jurisdiction with the appropriate taxation to apportion to that territory" (The Working Group for 21st Century Financing and Funding Models for Sustainable Broadband, 2021).

As with other small states, Trinidad and Tobago may face limitations in establishing regulatory structures on multinational OTT providers. On its own, the market size may be too small to offer significant incentives for OTT providers to retain their services in the country following authorisation requirements.

Through regional harmonisation, regional regulators can align their policies and create a unified regulatory framework that strengthens their bargaining powers with multinational OTT providers. Specifically, Trinidad and Tobago can leverage its membership to the Caribbean Community

(CARICOM) and the CARICOM Single ICT Space[21], to establish a regional approach to the regulatory oversight of transnational OTT services.

The CARICOM Single ICT Space is an ecosystem of regionally harmonised ICT policies, legislation, regulations, technical standards, best practices, networks and services. The vision and roadmap for the initiative has identified the need for such harmonisation throughout the region. This will entail amendments to national policies, to take account of both technological and regulatory developments, and identification and resolution of policy and institutional inconsistencies among the jurisdictions of Member States (CTU Secretariat, 2017).

Additionally, ITU has recommended that national regulatory authorities (NRAs) collaborate with each other and with competition authorities to ensure consistent and effective regulation of digital platforms (ITU and the World Bank, 2020). The Authority will continue its work with regional and international bodies such as the Caribbean Telecommunications Union (CTU), the Inter-American Telecommunications Commission (CITEL) and ITU to develop coordinated and consistent regulatory strategies.

In addition to international collaboration, the thrust towards digitalisation calls for increased cross-sectoral collaboration, for example across ministries and various national regulatory agencies. The Authority acknowledges the importance of regulatory collaboration with relevant agencies in formulating and implementing policies for digital services such as OTTs. Where applicable, the Authority shall establish collaborative initiatives with other local regulatory bodies to pursue mutual interests with respect to OTT authorisation and regulation and offer support where required.

Statement on Jurisdictional Challenges

18. *Recognising the jurisdictional challenges posed by OTTs, the Authority will continue to collaborate with regional and international bodies to develop a harmonised and coordinated strategy with the most suitable arrangements for the relevant players in the online space.*

[21] CARICOM Vision and Roadmap for a Single ICT Space: https://caricom.org/wp-content/uploads/vision_and_roadmap_for_a_single_ict_space_-_final_version_updated.pdf

7 Recommendations on OTT Contributions: Strategy 3 – Fostering OTT Investment Towards the Development of Digital Infrastructure in Trinidad and Tobago

In pursuance of section 3 (f) of the Act, the Authority recognises the need for regulatory strategies to attract alternative sources of investment in the region. Emphasis will therefore be placed on OTT providers that are responsible for a vast majority of broadband utilisation and who greatly impact audio-visual media markets in Trinidad and Tobago.

7.1 Recommendations on OTT Investment in Infrastructure in Trinidad and Tobago

The Authority will continue to monitor global trends in OTT investment, with the aim of developing a strategy to capture OTT contributions to local telecommunications infrastructure. The Authority will engage in discussions with stakeholders and propose a fair share arrangement model that will quantify OTT's contribution to infrastructure investment. In developing the model, the Authority will undertake data gathering exercises on prominent OTTs' uptake and bandwidth utilisation in Trinidad and Tobago.
The model will also consider the feasibility of extending universal service obligations to OTT providers, similar to the model under consideration in the United States.

Statements on OTT Investment in Infrastructure in Trinidad and Tobago

19. *The Authority will continue to monitor global trends in OTT investment, with the aim of developing and implementing a strategy to capture OTT contributions to local telecommunications infrastructure.*

20. *The Authority will evaluate the feasibility of the appropriate models, possibly a fair share arrangement, that quantifies OTTs' contribution to infrastructure investment.*

7.2 Recommendations on Local Content Development

The rational for regulatory intervention in this area is both economic and non-economic in nature. It includes reflecting community values (by ensuring the continued production of local content) and increasing the global competitiveness of domestic cultural products.

In this regard, the Authority will continue to monitor global trends in OTT contribution to local content and development. The Authority shall examine the feasibility of one or a mix of the following policy models for promoting local content:

1. **Establishment of a quota on share of local content:** This relates to targets on the volume or percentage of local content that is made available on an OTT's catalogue of programmes. This investment model supports the industry through driving up demand for local content productions.

2. **Requirements for direct investment:** This includes obligations on an OTT provider to directly invest in local content initiatives via productions, co-productions or acquisitions.

3. **Requirements for indirect investment**: This may be done through levies or OTT investment to a local content fund.

The Authority shall establish the criteria for identifying local content and assess the readiness of the local content market to support the strategies contained in 1–3 above. The Authority shall also report on specific policy objectives for local content and legislative amendments, where applicable to achieve these objectives.

Additionally, where applicable, the Authority shall collaborate with the relevant agencies responsible for the oversight of local content creation and promotion in Trinidad and Tobago.

Statements on Local Content Development

21. The Authority will continue to monitor global trends in OTT contribution to local content and development.

22. The Authority will examine one, or a mix of various policy models for promoting local content, inclusive of:

   a. conducting a feasibility study in the first instance.
   b. utilising a partnership approach with OTT service providers to stimulate digital content development and investment.

23. Where applicable, the Authority shall collaborate with the relevant agencies responsible for the oversight of local content creation and promotion in Trinidad and Tobago.

7.3 Collaborative Framework for OTTs and TSPs

Recognising that network operators and OTTs are part of the international telecommunications/ ICT ecosystem, ITU has issued a Recommendation that "encourages relevant stakeholders to work towards an enabling regulatory environment that supports and encourages the development of innovative business models in line with the advancement of technology and innovations" (ITU, 2020).

Considering the benefits of OTTs and the extensive collaborative opportunities that exist between OTTs and TSPs (see section 4.3), it is important that the Authority's regulatory framework creates an enabling environment for fair commercial interactions between the two parties. Attendant policies and regulations on OTTs, where applicable, shall, consider the ITU's recommendations, which state:

1. support and encourage the development of innovative business models, in line with the advancement of technology and innovation.

2. not inhibit markets and ensure a competitive landscape is assured for the benefit of consumers.

3. grant telecommunications network operators the adaptability and flexibility to adopt the relevant and innovative business models, such as the transition to data-centric, end-user tariff structures, to reduce dependence on revenues from traditional telecommunications services.

4. permit telecommunications network operators to offer their own OTT applications without subjecting them to legacy telecommunications regulations, as long as those applications, as well as underlying broadband Internet access services, are offered in a manner that does not disadvantage or discriminate against competitive alternatives.

5. enable voluntary commercial arrangements among telecommunications network operators and providers of OTT applications, so as to allow each to invest in Internet infrastructure, without subjecting the parties to traditional telecommunications regulatory requirements.

Additionally, ITU has recommended that Member States take specific measures to:

1. promote mutual cooperation, as far as practical, between providers of OTTs and telecommunications network operators.

2. consider conducting analysis on the competition impacts (including transparency, non-discriminatory conditions, innovations and consumer benefits) of those arrangements.

While there are existing collaborative initiatives between OTTs and TSPs globally and locally, there are growing needs and opportunities for additional partnerships (ITU, 2020).

It is evident that countries have applied regulation to areas where there are clear and specific market failures. For example, the case studies cited in Section 2 and the work that is being undertaken by these countries is a reaction to the existence of positive externalities where OTT service providers are free riding on the infrastructure of TSPs. This can have ripple effects whereby anti-competitive behaviour can arise in other markets beyond telecommunications and broadcasting.

In the Caribbean case, there are signals that competition between communications OTT service providers and telecommunications services suppliers could potentially be problematic. A justification for intervention may be positive externalities, i.e., OTT service providers benefit from the infrastructure of telecommunications operators without having to pay for those benefits. This free rider problem could potentially lead to the underdevelopment of network infrastructure as telecommunications operators reallocate revenues for network infrastructure development to support increased broadband usage. As such, the Caribbean region may need to create a collaborative approach to specifically regulate OTT service providers.

In terms of the relationship between OTT providers and TSPs, the Authority shall continue to support collaborative initiatives between TSP and OTT providers. Such interactions shall be guided by the principle of net neutrality. The Authority's policy recommendations on net neutrality are contained in its *Framework on Net Neutrality in Trinidad and Tobago.*

Statement on Collaborative Framework for OTTs and TSPs

24. *The Authority shall adopt measures to promote an enabling environment for fair commercial interactions between OTTs and TSPs.*

25. *The Authority notes the importance of adopting a fair, consistent and non-discriminatory regulatory approach on OTTs, regardless of the residence or current authorisation status of the OTT provider.*

26. *The Authority shall continue to support present and future collaborative initiatives between TSP and OTT providers. Such interactions shall be guided by the principle of net neutrality. The Authority's policy recommendations on net neutrality are contained in its Framework on Net Neutrality in Trinidad and Tobago.*

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