Submission to Colombia's Ministry of Information and Communications Technologies and Communications Regulation Commission

CCIA Comments on OTT Services and the Digital Sector in Colombia

Below please find the submission of the Computer & Communications Industry Association ("CCIA") regarding the consultation[1] of the Ministry of Information and Communications Technologies and Communications Regulation Commission into over-the-top ("OTT") services and the online ecosystem in Colombia. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks.[2]

Section 2 Questions:

Question 2.1 Given that end users' access to OTT services is done through Internet networks, explain in general terms what the operating relationship is like between OTT services and Telecommunications Network and Service Providers?

At one level, OTT suppliers are like any other commercial user of the internet, a fact that underscores the need to ensure that they will not be subject to differential and/or discriminatory treatment. It is also true, however, that unlike some other services, OTT services providers and telecommunications network and service providers share a uniquely symbiotic relationship that together create a healthy internet ecosystem. This relationship involves cooperation and it benefits both parties equally—this comes from the fact that each player relies on the strong performance of the other to cultivate large, loyal customer bases.

The global market for the carriage and peering of internet traffic boasts strong competition, historically persistent declining costs, and a durable subscription base. These factors suggest that even though broadband network traffic has increased, regulatory intervention is not necessary to address any purported investment shortfall,[3] especially when considering the potential negative effects such regulations could have on the broader internet ecosystem.

Consider the finding of the renowned telecommunications research firm, TeleGeography, in its most recent State of the Network 2024 report: "International transport unit costs underlay IP transit pricing. As new international networks are deployed, operational and construction costs

[1] https://www.crcom.gov.co/system/files/Proyectos%20Comentarios/9000-38-2-22/Propuestas/consulta-ecosistema-digital-crc-mintic-111224.pdf.
[2] For more, visit www.ccianet.org.
[3] https://www2.telegeography.com/download-state-of-the-network at 10-11 ("Providers' shift to predominantly 100 Gbps internet backbones continues to reduce the average cost of carrying traffic, and enables profitability at lower prices. As a result, price erosion remains the universal norm. It reflects the introduction of competition into new markets and the response of more expensive carriers to lower prices. Trends in the IP transit market generally follow regional trends in the transport market.").

are distributed over more fiber pairs and more active capacity, making each packet less expensive to carry."[4]

These declining costs are important in the context of OTT providers' impact on telecommunications networks, because the growth of those "international networks," a key element of carriage costs, particularly for foreign suppliers, has been heavily funded by OTT providers. One prominent example is the submarine cable networks that carry internet traffic between continents, improving latency and reducing strain on domestic and cross-continental networks within South America.[5]

Overall, research shows that online service providers have invested over USD 120 billion annually in internet infrastructure globally from 2018-2021.[6] OTT providers foster efficient use of networks to ensure their customers can access their services through reliable connections. Internet-enabled applications—both on web browsers and through app stores—have endless options for consumers to spend their time online, meaning the market for online services is extremely competitive. As such, quality of connection and quick loading times are essential for any OTT service provider, with the added benefit of saving money on transit fees that lowers costs for telecommunications providers.

OTT service providers also invest heavily in improving network performance through investments in network capacity, caching, and the use of content delivery networks ("CDNs"). Caches refers to the practice of storing a copy of data closer to local ISPs that therefore facilitates future requests for that data to be delivered faster than if the request was sent to access the data's primary storage location.[7] CDNs deploy networks of caching servers to bring content closer to the end user—thus also reducing overall carriage needs.

Further, OTT providers promote efficient use of networks by tailoring their services based on network capacity and device type. The vast majority of OTT providers—particularly the largest operators, which frequently are targeted through consultations such as this one—deliver their audiovisual content to the consumer based on the bandwidth available. Streaming providers do not send the same volume of traffic for the same content to every single customer seeking to engage with that content. Consumers with a slower broadband connection receive a different volume of traffic from OTT providers, in an effort to decrease the burden on the broadband network and make sure that the customer is able to actually watch their content. Similarly, for consumers accessing content on a mobile device, resolution and bandwidth requirements differ from that of fixed networks and suppliers adjust the stream accordingly.

[4] https://www2.telegeography.com/hubfs/LP-Assets/Ebooks/state-of-the-network-2024.pdf?utm_medium=email&_hsenc=p2ANqtz-_ZJtN4CRIEwvpQ7f7z3SqwhjP_mksb-sqUqcRg1hJt-nKSiE9YRB0bnD6TfGQ-PRlKEDEVIAoor85rdp9tsip7Yy-Evw&_hsmi=60033117&utm_content=60033117&utm_source=hs_automation at 14.
[5] https://blog.telegeography.com/building-tomorrows-internet-an-update-on-new-cable-investment; and https://www.analysysmason.com/research/content/articles/submarine-cable-forecast/.
[6] https://www.analysysmason.com/consulting/reports/internet-content-application-providers-infrastructure-investment-2022/.
[7] https://www.internetsociety.org/blog/2022/09/sender-pays-what-lessons-european-policy-makers-should-take-from-south-korea/.

Developing and managing such highly-tailored offerings requires significant investment by OTT suppliers, the benefits of which flow directly to the telecommunications operators.

The joint gains from this symbiotic relationship are clear from the fact that OTT services providers are one of (if not the) key drivers of demand for telecommunications services, which leads to an increase in revenues and ability to make further investments for telecommunications suppliers. As Fernando Borjón and Geusseppe González argue in a recent article analyzing the so-called "fair share" issue in Latin America, "There is a directly proportional relationship between data consumption and internet spending: the greater the use of digital platforms, the greater the communication of data, the greater the internet traffic, and the greater the spending by users. Secondly, the opposite: less usage of a digital platform results in lower data consumption and, consequently, reduced internet spending by users."[8]

This investment appears to have robust results. Colombia is among the countries in Latin America with the highest percentage of internet users in its population,[9] and Latin America's internet bandwidth overall has grown at a 30% rate annually between 2019 and 2023.[10] In 2022, 73% of Colombia's population used the internet, compared to 62% five years prior to that, and 49% in 2012.[11] There does not appear to be a market failure for which any sort of intervention—which, again, could undermine all of the great development that has occurred in the internet ecosystem in Colombia—would be justified.

Further illustrating the point that OTT services drive telecommunications services demand, a Deloitte study found that the "annual value attributed by European Internet users to accessing services" offered by large AVS providers were between €32bn-€53bn for fixed broadband and between €55bn-€91bn for mobile broadband.[12] A recent study by several economists also found that video-on-demand services have served as a "key contributor to the increase of broadband connectivity, even helping to narrow down the digital divide especially in developing nations," while also having a positive association with a "gradual increase in the purchasing of broadband higher speeds" and consumer surplus.[13]

Question 2.3 Do you consider that in those cases in which cooperation agreements or commercial agreements fail, between providers of telecommunications networks and services and providers of OTT digital services, for the use of infrastructures, it would be necessary to define conditions for the resolution of disputes? What conditions do you propose? We invite you to argue your answer.

The government should refrain from implementing any sort of regulatory regime that would establish mandatory payment between OTT providers and telecommunications providers.

[8] https://iicintermedia.org/vol-51-issue-4/fair-connectivity-in-latin-america/.
[9] *Id.*
[10] https://www2.telegeography.com/hubfs/LP-Assets/Ebooks/state-of-the-network-2024.pdf.
[11] https://data.worldbank.org/indicator/IT.NET.USER.ZS?locations=CO.
[12] https://ccianet.org/research/case-studies/estimating-value-content-applications-services-internet-users-europe/#main-content.
[13] https://www.sciencedirect.com/science/article/abs/pii/S030859612400048X.

Such a framework would raise numerous competitive concerns, endanger the online user experience, and harm the internet ecosystem.[14]

A mandatory payment requirement, even if adopted as a failsafe when cooperation agreements fail, would reduce investment in network architecture, decrease innovation, increase prices, worsen online experiences for end users,[15] and undermine stable, long-term financing for infrastructure. It is likely that setting up a mandatory dispute resolution system would incentivize the party seeking payment–invariably, the telecommunications supplier–to invoke such a mechanism rather than negotiating in good faith or relying on its own resources to improve network performance.

A regulatory framework that requires OTT providers to pay based on data traffic could result in effectively double-charging for the same infrastructure. In general, the creation of such fees would ultimately harm consumers. Network fees may require OTT providers to reduce investment in their services and/or raise prices, while also creating an incentive structure that does not prioritize ISPs' efforts to improve network investment and innovations, but, rather, their ability to access a constant revenue stream from providers reliant on ISPs to reach their customer base. Finally, there is no guarantee that the fees will be invested to the benefit of consumers.

The experience of South Korea's application of the sending party network pays ("SPNP") policy in 2016 should serve as a model for precisely how "network usage fees" and similar intervention efforts can backfire. South Korea's mandatory fees for internet traffic resulted in higher transit prices and lower network quality after the policy went into effect, and resulted in numerous content suppliers locating their storage and delivery facilities outside of Korea to avoid the fees.[16] At least one company who did not have that option resorted to degrading the quality of its service, (offering a lower-resolution product) and then, ultimately, abandoning the market.[17] Studies show that Korea's regime decreased investment (fewer CDNs, little use of Internet Exchange Points; hesitance to bring new cables to shore), lowered quality of service (which came following the decrease in volume of CDNs), and increased prices for end users.[18] CCIA Research detailed the troubling results of the SPNP model:

> In addition, the performance of Korea's internet since implementation of SPNP is already suffering relative to baseline trends, as reflected in increased latency,

[14] https://www.internetsociety.org/blog/2022/05/old-rules-in-new-regulations-why-sender-pays-is-a-direct-threat-to-theinternet/ ("The consequence is a form of Internet fragmentation where end-users can only access online services that have contracted with their ISP or telecom provider. And at the quality and conditions stipulated by these arrangements. In addition, and depending on implementation, these proposals are close to charging 'valuable' services more than others. The expectation that all packets are the same and therefore treated neutrally, is then broken."); https://www.techdirt.com/2022/11/22/the-globaltrend-that-could-kill-the-internet-sender-party-network-pays/.
[15] https://blog.cloudflare.com/eu-network-usage-fees/ ("The Internet works best – fastest and most reliably – when networks connect freely and frequently, bringing content and service as close to consumers as possible. Network usage fees artificially disincentivize efforts to bring content close to users, making the Internet experience worse for consumers."); https://itif.org/publications/2022/11/07/consumers-are-the-ones-who-end-up-paying-for-sending-party-pays-mandates/.
[16] https://ccianet.org/research/reports/myths-surrounding-network-usage-fees-south-korea/ at 5-6.
[17] https://blog.twitch.tv/en/2023/12/05/an-update-on-twitch-in-korea/.
[18] https://researchictsolutions.com/home/wp-content/uploads/2022/11/RIS-Europe-FINAL.pdf.

> as well as increased packet loss and degraded mean throughput trends. Korea developed the worst latency in the OECD after SPNP despite its top-quality infrastructure buildout. It is likely that the Korean internet will increasingly suffer relative to trends prior to SPNP.[19]

If, following the flawed logic of considering the status quo as a "pricing problem" or a "free-rider problem," a mandatory compensation scheme was to be imposed on OTT providers to purportedly level the playing field, this regulatory intervention could reverse the benefits that have resulted from online service providers' significant investments into data centers and access points to strengthen CDNs and cloud services.

Mandatory dispute settlement effectively amounts to the same policy as a network usage fee or SPNP, as it places a disproportionate amount of power in the hands of the ISPs, who already have a termination monopoly. With such a requirement in place, ISPs would have an incentive to *not* reach commercial agreements, as they could instead gather more revenue if they decline to reach a deal and take the mandatory payments from OTT providers. Instead of adding a backstop obligation for OTT providers to pay, the government should allow the market to dictate best terms for connectivity agreements, a framework that has and will continue to promote advancements in connectivity that best serve consumers.

Additionally, imposing such a required redistribution scheme would likely violate Colombia's trade commitments under the U.S.-Colombia Free Trade Agreement and the World Trade Organization's Telecommunications Annex, as detailed below in these comments.

Further, such a regime would undermine the principles of net neutrality and open competition. Network usage payments are fundamentally arbitrary mechanisms for treating certain data traffic differently and strengthening their control over users' access to the internet. The introduction of network fees will effectively create a two-tiered internet, where OTT providers with the ability to pay ISPs to reach their customers will be treated preferentially, for example with better services, which will result in their ability to solidify an advantageous position. By contrast, OTT providers that cannot make such payments will be discriminated against with lower quality service. We discuss all of this in more detail further below in these comments.

Finally, it is relevant to note how, despite continued pressure from incumbent telecommunication companies also in other areas of the world, this type of detrimental policy has not been implemented. For example, the Communications Committee of Brazil's Chamber of Deputies has recently approved a bill that prevents telecommunications operators from charging content providers,[20] such as streaming platforms and social networks, to fund their network infrastructure. Similarly, in a recent case in Switzerland,[21] the Swiss Telecom Regulator ruled that Swisscom,[22] national telecommunications company, is obliged to operate interconnections with Init7 on the basis of zero-settlement peering, as opposed to a paid-

[19] https://ccianet.org/wp-content/uploads/2023/11/CCIA_Myths-Surrounding-Network-Usage-Fees-South-Korea.pdf.
[20] https://www.camara.leg.br/noticias/1122249-COMISSAO-APROVA-PROJETO-QUE-PROIBE-PROVEDOR-DE-TARIFAR-PLATAFORMAS-POR-USO-INTENSIVO-DE-INTERNET.
[21] https://www.init7.net/de/news/241223-mm-init7-comcom-orders-swisscom-must-operate-zero-settlement-peering-with-init7-en.pdf.
[22] https://www.init7.net/de/vf-2024-12-19-001-entscheid-comcom-verf-init7-swisscom-interconnect-pering.pdf.

peering agreement requested by Swisscom. More broadly in Europe, stakeholders are continuing to pressure the European Commission to refrain from introducing any mechanism amounting to a sending party network pays principle,[23] and consumer and NGOs complaints are ongoing against telecommunications companies that are in breach of net neutrality rules.[24]

Question 2.4 What could be the possible challenges arising from these cooperation agreements or trade agreements? How might they affect or benefit user access and choice? We invite you to argue your answer.

If Colombia were to establish a regime—such as that explored by the European Union and South Korea—that required online service providers to pay broadband service providers for network access, infrastructure development, or otherwise as compensation for the traffic that comes as a result of consumer demand, it would implicate several trade commitments between the United States and Colombia.

Under the U.S.-Colombia FTA Article 14.2 of the Telecommunications Chapter (on Access and Use), Colombia has an obligation to ensure that all U.S. service suppliers are provided access to and use of any public telecommunications network or service on reasonable and non-discriminatory terms and conditions. Article 14.2.5[25] states:

> Each Party shall ensure that no condition is imposed on access to and use of public telecommunications networks and services, other than as necessary to:
>
> (a) safeguard the public service responsibilities of suppliers of public telecommunications networks and services, in particular their ability to make their networks or services available to the public generally; or
>
> (b) protect the technical integrity of public telecommunications networks or services.

This commitment is essential to promoting countries' cross-border services commitments, since in the modern-day economy, electronic delivery is the primary method used by U.S. cross-border suppliers to serve Colombian businesses and consumers. Since there is no credible evidence that intervention is necessary to meet the goals of the permitted exceptions (a) and (b) noted above, introducing mandates for U.S. companies to effectively pay for such access to telecommunications networks would likely violate the FTA at the telecommunications chapter. The logic of seeking remuneration for traffic and infrastructure costs from online service providers could easily be extended to other data-intensive services, such as autonomous or connected cars, financial services, cloud services, online shopping, or any other service that meets the specified threshold, thus implicating the market access rights of a much broader set of service suppliers.

If the government were to require online service providers to pay a fee, or otherwise require parties to enter into contractual relationships, it would arguably represent unreasonable terms

[23] https://www.internetsociety.org/open-letters/preserving-the-open-internet/.
[24] https://netzbremse.de/.
[25] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file935_10162.pdf at 2-3.

and conditions for access to the network. This is due to the fact that the global norm for internet service is for companies to enter into voluntary agreements for settlement-free peering—studies have shown that 99 percent of traffic exchanged was settlement-free.[26]

If the government were to grant the one entity in the internet ecosystem the power to set terms and conditions of broadband connectivity (including rates), despite that player already having the ability to exercise monopoly power through control over access to its subscribers, this would constitute an unreasonable market intervention. This would also undermine user access and choice, as the services that flourish in Colombia would not be determined based on which application or website offered the most innovative or unique services, but instead on their payments and treatment by the ISPs.

Question 2.5 Are there competitive tensions between PRSTs and OTT digital service players? Is there indirect competition between these agents?

A regime that introduces mandatory payments—in any form—between online service providers and Network Providers and Telecommunications Services ("PRSTs") would tip the balance of competition in the favor of the PRSTs. This is because such a model would likely disproportionately benefit telecommunications providers, many of which provide both internet access and online content services, serving as both a telecommunications provider and an online content provider. Consider that the three largest ISPs—Claro, Tigo, and Movistar, which account for about 71% of the market share in Colombia[27]—all have their own streaming services that are prominent in the OTT market.

If online service providers were required to pay ISPs (what are referred to as PRSTs in this consultation) for traffic or infrastructure that they themselves cannot access but the ISPs can, these ISPs would stand to directly benefit at the expense of the online service providers. This is thanks to the fact that they recoup revenue from their competitors (from the United States) while at the same time offering a product to consumers that also brings in revenue *and* competes with the product offered by their online-only rivals.

As such, the content services owned by PRSTs would hold a competitive advantage over content services owned by OTT providers, because they would be able to offer their own content free of the charges imposed on competing online-only providers. By preferencing their own content, PRSTs would be denying OTT providers non-discriminatory access to the network, likely violating the trade rule noted above.

Indeed, the Body of European Regulators for Electronic Communications (BEREC) has clearly stated that in the market for IP interconnection there is balance in the bargaining power of ISPs and OTTs,[28] as the former own a technical "termination monopoly," whereas the latter provide "must have content." However, the balance of powers might indeed be more favorable to ISPs, as demonstrated by a dispute involving Netflix and Comcast, which

[26] https://www.pch.net/resources/Papers/peering-survey/PCH-Peering-Survey-2016/PCH-Peering-Survey-2016.pdf.
[27] https://www.opensignal.com/reports/2024/07/colombia/fixed-broadband-experience.
[28] https://www.berec.europa.eu/en/all-documents/berec/reports/berec-report-on-the-ip-interconnection-ecosystem.

ultimately led Netflix to sign a paid peering agreement, which, according to the BEREC, "indicates that availing of "must have" content or a high market capitalization does not automatically imply that large CAPs have higher bargaining power vis-à-vis IAS providers."[29] In addition, the BEREC reported that according to its workshops with stakeholders, "most disputes [in the IP interconnection market] stem from vertically integrated IAS providers attempting to leverage their termination monopoly into the transit/peering market and to introduce (higher) fees for IP-IC directly from CAPs"[30]

This is a central concern often raised in the net neutrality context, as a mandatory payment framework would result in paid-for fast and slow lanes of the internet. The primary beneficiaries would be content providers that are also PRSTs, but online-only providers that strike deals with PRSTs would also receive preferential treatment compared to non-paying providers. Most concerning in this context, however, is that PRSTs would effectively receive their own fast lane that is not only free, but is forcibly subsidized by their competitors: the OTT providers.

Section 3 Questions:

3.1 Given the growing trend of Internet traffic worldwide that demands more investments in access network capacity, what schemes could be adopted between network and telecommunications service providers and OTT digital service agents that generate large volumes of traffic, to boost the adaptation of access networks? We invite you to argue your answer.

As detailed above in response to Question 2.3, the current relationship between OTT providers and internet service providers has resulted in a competitive internet ecosystem and countless innovations in connectivity and information services in the past several decades. The latest stage of this competitive landscape has brought about new innovations, including tools that use generative AI to ease network management, largely spurred by investments from online service providers, that could further decrease the need for more traditional network investments.[31] As such, the government should refrain from implementing any mandatory schemes between these entities that could otherwise tip the scales or unfairly benefit certain players over others. Moreover, the premise of a great increase in data traffic is also not undisputed. Indeed, academic reports and ample research show that data traffic will not grow exponentially in the coming years, and that annual growth in data is slowing down.[32]

[29] *Id.*
[30] https://www.berec.europa.eu/en/document-categories/berec/reports/draft-berec-report-on-the-ip-interconnection-ecosystem.
[31] https://cloud.google.com/blog/topics/telecommunications/generative-ai-in-the-telecom-industry.
[32] https://www.analysysmason.com/research/content/articles/cellular-data-traffic-rdnt0/ and https://www.linkedin.com/pulse/low-fixed-traffic-growth-old-normal-robert-kenny-sibff/?trackingId=YQwGYuxPga%2FEc3Qa9%2FkY9A%3D%3D.

Question 3.2 What opportunities or risks in relation to consumer freedom of choice could the schemes proposed in the previous question bring? We invite you to argue your answer.

As mentioned above, introducing a requirement for OTT providers to contribute to ISPs for traffic demanded by consumers would bring with it a wide range of competition concerns, including from a consumer choice perspective. This policy would allow PRSTs to choose winners and losers in the market, with these determinations made based on which company pays for the best deals from the ISPs, rather than which companies offer the most compelling services in the eyes of consumers. Additionally, ISPs that own both networks and streaming services would gain an unfair advantage over other OTT providers, tipping the scales of consumer choice to give preferential treatment to those companies at the expense of unaffiliated OTT providers. Finally, consumers will likely find that additional charges imposed on OTT providers for obligatory payments to ISPs will be passed onto them through additional monthly charges, when applicable. Indeed, consumer organizations in Europe have been extremely vocal against the introduction of any such mechanism.[33]

Question 3.8 Should OTT digital service agents contribute to the Single Fund for Information and Communications Technologies to support the purpose of the aforementioned fund, which is defined in article 34 of Law 1341 of 2009?

If Colombia were to pursue such a requirement, where OTT service providers pay into a "universal service fund" that they are themselves not able to withdraw from, this would likely contravene Colombia's FTA commitments (Article 14.8) as well its WTO GATS Reference Paper commitments, both of which stipulate:

> Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.[34]

A fund that requires U.S. OTT providers to contribute but not access a fund would violate the key tenets of both non-discrimination and competitive neutrality. This reflects the fact that mandating OTT providers to pay into a fund for network infrastructure and other Information and Communication Technology projects to improve connectivity access would be an ill-fitted obligation for these entities. OTT providers do not own or have access to network infrastructure or spectrum, unless otherwise owned or partnered with traditional ISPs. Owning that infrastructure and spectrum brings a wide range of additional benefits that OTT providers

[33] Please see: (i) https://ccianet.org/news/2024/05/eu-telecom-ministers-should-defend-open-internet-rejecting-commissions-attempt-to-prop-up-big-telcos-broad-coalition-stresses/.
(ii) https://www.beuc.eu/sites/default/files/publications/BEUC-X-2023-060_Fair_for_Consumers_the_future_of_Connectivity_and_the_Open_Internet.pdf; (iii) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14168-White-Paper-How-to-master-Europes-digital-infrastructure-needs?/F3470754_en.

[34] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file935_10162.pdf and https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art18_oth.pdf.

do not have. As such, mandating their participation in a fund for entities that have these characteristics that they do not would not track with reasoned policy, but instead would align with rent-seeking behavior.

Section 6 Questions:

Question 6.1 Should OTT digital service agents that provide video-on-demand services adopt mechanisms that promote production and access to national works? If yes, identify which ones and we invite you to explain your answer.

This section discusses Canada's *Online Streaming Act*, a law that CCIA has detailed as discriminatory and violative of the U.S.-Mexico-Canada Free Trade Agreement (USMCA) in its construction,[35] through its base funding obligations,[36] through its requirement for online streaming companies to fund domestic news businesses,[37] and due to its restrictive rules that link IP ownership and onerous staffing requirements for content to qualify as "Canadian."[38] Additionally, this consultation refers to Australia's ongoing efforts to implement a similar requirement for streaming companies to fund Australian content, which would similarly run afoul of the U.S.-Australia Free Trade Agreement (AUSFTA).[39] Since Colombia's FTA commitments with respect to online services are so similar to those found in USMCA, the implications of Colombia following Canada's lead would result in the same legal jeopardy.

U.S. companies already provide substantial investment into Colombia's audiovisual sector, and the nature of these services providers' global reach helps export Colombian cultural content around the world. This participation in the Colombian film industry resulted in Colombian audiovisual services and content exports reaching $206.6 million in 2022, reflecting a 29% growth in the past 7 years.[40]

Given Canada's *Online Streaming Act* has already been enacted and is in the implementation phase, we respond to the references of this law (and the 5% and 1.5% contribution requirements) from the consultation. We will then detail how a similar structure, if adopted in Colombia, could contravene commitments in the U.S.-Colombia Free Trade Agreement.

The Canadian Radio-television and Telecommunications Commission (CRTC) has pursued a structure of mandatory contributions that contravenes Canada's commitments to the United States under USMCA. Specifically, the CRTC's requirement that all online streaming suppliers earning $25 million or more "devote not less than 5% of its annual contributions revenues derived from its audio-visual broadcasting activities from the previous broadcast year to the

[35] https://ccianet.org/library/ccia-white-paper-on-canadas-online-streaming-act-bill-c-11/
[36] https://ccianet.org/library/ccia-comments-on-canadas-obligatory-base-contribution-for-streaming-suppliers/.
[37] https://ccianet.org/library/ccia-comments-on-mandatory-contributions-to-the-independent-local-news-fund/.
[38] https://ccianet.org/library/ccia-submission-to-the-crtc-on-canadian-content-requirements/.
[39] https://ccianet.org/wp-content/uploads/2024/10/CCIA_Comments-for-the-2025-USTR-National-Trade-Estimate-Report.pdf at 50-54.
[40] https://investincolombia.com.co/en/resources/invest-colombia-audiovisual-industry.

support of Canadian and Indigenous content" implicates two provisions of USMCA in discrimination against non-Canadian entities and products.[41]

First, this contribution requirement violates USMCA Article 19.4, as it discriminates against non-Canadian digital products. Canadian digital products (*i.e.*, videos, music) receive preferential treatment as beneficiaries of these funds. The definition of "digital product" under USMCA clearly covers the film, television, music, and other audiovisual and audio content covered by the CRTC's framework: "a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically."[42] By providing preferential treatment to Canadian content by forcibly redirecting U.S. suppliers' revenue towards the production of more Canadian content—which, by current definition, U.S. suppliers themselves cannot create—the CRTC's framework violates the spirit and letter of USMCA Article 19.4.

Second, the CRTC's regime would discriminate against U.S. suppliers in a manner that invokes the Cross-Border Trade in Services chapter, in Article 15.3. Although both Canadian and non-Canadian streaming services will be required to contribute to funds dedicated to producing Canadian content, *only* Canadian services would be able to access these funds. As such, U.S. suppliers would be put at a competitive disadvantage, and subject to discrimination proscribed by Article 15.3.1.

Third, the CRTC's framework would violate the USMCA Investment Chapter, specifically those governing performance requirements (Article 14.10.1 (b)) that prohibit Parties to the agreement from enforcing requirements "to achieve a given level or percentage of domestic content."[43] As the CRTC has permitted 1.5% of the 5% obligation to be relieved for suppliers if they produce or acquire certified Canadian content, that serves as a requirement for non-Canadian suppliers to achieve a given percentage of domestic content. A requirement for online streamers to spend a percentage of revenue on Canadian content and contribute to funds supporting the creation of Canadian content has a similarly limiting effect to a quota, as it ensures a minimum amount of development of Canadian content.[44]

This consultation refers to Canada's requirement for streaming companies to contribute to domestic news as well. These obligations implicate many of the same trade commitments detailed above, as CCIA detailed to the CRTC.[45] While the production of local and independently-produced news is critical, this method is also unjust, and it is unclear whether supplementing this fund by imposing obligations on foreign providers that are not in the same service industry will even make an impact. As such, we would urge Colombia to avoid unproductive approaches in its market.

Many of Canada's commitments that should prohibit this treatment of U.S. streaming companies apply to Colombia. Further, unlike Canada, Colombia does not have a Cultural

[41] https://crtc.gc.ca/eng/archive/2024/2024-121.htm
[42] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf.
[43] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf.
[44] https://ccianet.org/wp-content/uploads/2023/01/CCIA_Canada-Online-Streaming-Act_Bill-C-11_Whitepaper.pdf at 9-10.
[45] https://ccianet.org/library/ccia-comments-on-mandatory-contributions-to-the-independent-local-news-fund/.

Industries exception with the United States in its FTA. Therefore, introducing similar rules and funding obligations to Canada could implicate commitments in Article 15.3.3 on Digital Products,[46] Article 11.2 on National Treatment of Cross-Border Services Providers,[47] and Article 10.3 on National Treatment of Investors,[48] and Article 10.9 on Performance Requirements.[49]

Although Colombia negotiated an exception in the FTA to provide government support for cultural industries and activities and the ability to provide non-Parties (i.e., third countries) preferential treatment in its non-conforming measures,[50] these provisions would not provide Colombia the flexibility to adopt what Canada has enacted. These mandatory funding obligations are not "government support" in the way of a subsidy, but rather are forced revenue transfers between foreign market entrants and local incumbents. As such, they would not qualify under Colombia's non-conforming measure, as "government support" is defined as "tax incentives, incentives for the reduction of mandatory contributions, government grants, government-supported loans, and guaranties, trusts, or insurance provided by a government, irrespective of whether a private entity is wholly or partially responsible for management of the government support."[51] Further, while Colombia's non-conforming measure seeks to address MFN concerns by allowing preferential treatment to non-Parties, it does not include permission to violate national treatment obligations. Additionally, although Colombia does have flexibility to introduce some quotas promoting Colombian cinematographic works, these are very specifically tailored to cinemas or exhibition rooms (15%) and free-to-air-television (10%).[52] For this exception to be applicable in streaming, it would have had to be more broadly scoped or specifically include interactive audiovisual services.

As such, the provisions in the U.S.-Colombia FTA for national treatment protections for digital products, cross-border trade in services, and investment would all be applicable, if Colombia were to adopt Canada's approach to online streaming regulation.

Section 7 Questions:

Question 7.1 How effective do you consider self-regulation methods and implementation monitoring methods to be in controlling disinformation? We invite you to argue your answer.

Self-regulation methods and implementation monitoring methods provide for flexible, context-specific approaches that reduce the risk of online disinformation. Already, most social media websites invest significant resources into content moderation, removing illegal content and removing or labeling false or misleading content where necessary, while ensuring that users can express their views. For example, companies enforce their terms of service (ToS) through the use of automated tools, third-party fact-checkers, and user interfaces that allow content to be reported and reviewed for potential ToS violations. They may develop issue-specific

[46] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file324_10191.pdf at 1-2.
[47] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file466_10188.pdf at 2.
[48] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file630_10143.pdf.
[49] *Id.*
[50] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file893_10176.pdf at 7-8.
[51] *Id.*
[52] https://ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file893_10176.pdf at 11.

response mechanisms, for example around public health and child safety, highlighting the importance of context-specific interventions. Platforms have a strong interest in doing so, as the prevalence of mis- and disinformation can incur significant reputational costs from users and advertisers alike. In addition, self-regulation allows platforms to craft content moderation policies most relevant to their ToS, the content they host, and the risks their users most commonly face.

Websites should have the opportunity to voluntarily enforce their content moderation policies without being penalized for good faith efforts. More stringent, top-down regulatory regimes that imposed strict, universal requirements on platforms to remove content within narrow windows of time risk stifling freedom of expression and innovation. First, they can incentivize platforms to overly regulate, increasing the risk that expressive content that does not violate ToS is removed. Second, excessively strict regulations require significant resources to enforce that can be unmanageable for smaller platforms, harming the platform ecosystem. Therefore, sanctions to enforce content moderation should only be employed when deemed strictly necessary, where there is a clear public safety threat, and where there is clear evidence of a pattern of failure by platforms to enforce their ToS. Even in these limited contexts, sanctions should be proportionate and avoid resulting in excessive content removal that could impinge on freedom of expression.

One method to enhance self-regulation, as referenced in this consultation, is through voluntary codes of practice. Codes, when properly designed, are flexible co-regulatory instruments with outcomes-based metrics that don't significantly increase operating costs for participating companies. Their co-regulatory design allows platforms to provide their expertise to craft workable rules reflecting industry best practices that align with policy objectives. Codes are also flexible, as social media platforms provide different services and use different content moderation systems, and these services and systems are constantly evolving. By providing flexibility, codes reduce the risk of regulatory fragmentation, especially important in large single digital markets like the EU or regions with a shared language such as Spanish-speaking South America.

Question 7.2 What principles and measures do you consider necessary to mitigate disinformation and not affect freedom of expression?

First, websites often employ, and governments should not disincentivize, the adoption of content moderation policies that focus on clear harms, in order to limit potential risks to freedom of expression or the risk of differing interpretations across jurisdictions. Second, content moderation principles should align with existing international human rights frameworks where relevant.