ETNO Position Paper

European Commission proposals for WTO disciplines and procedures relating to e-Commerce, and for the Review of the WTO Reference Paper on Telecommunications Services

ETNO is following with great interest the developments at the WTO to define rules for Electronic Commerce and to update the **Reference Paper on Telecommunications Services**, as well as to negotiate and update **specific commitments related to the digital economy**.

ETNO supports the view that the e-Commerce negotiations should consider the digital economy more broadly, rather than just 'e-Commerce', and define a framework for global disciplines embracing the whole digital ecosystem, including rules for the telecommunications sector, which underpin digital trade and e-Commerce.

The WTO is the right level to agree on a set of requirements for e-Commerce – including competitive safeguards – to foster a new balance to:

1. Promote "same service same rule" as a fundamental principle, irrespective of the underlying technology, the location (local or remote) or the type of company that provides the service; and

2. **acknowledge the economic value of data**: data itself has and generates economic value, it is the new factor of production. Certain market players control vast amounts of data, which can constitute an entry barrier for new entrants. To ensure this risk is well addressed, data should be considered when analysing dominance and market powers.

With this objective in mind, and in line with previous ETNO position papers on trade issues, ETNO respectfully presents a set of comments and proposals.

Proposals related to the disciplines and commitments relating to e-Commerce

In its Communications on the Joint Statement on Electronic Commerce[1] the European Commission makes a list of proposals for the negotiations, which the ETNO members globally support. ETNO members would however like to add some additional comments on the following items:

Consumer protection (article 2.3): ETNO members support the European Commission's vision in relation to consumer protection and the need to have a legally binding principle ensuring that Member States have legislative frameworks in place that protect consumers from fraudulent and deceptive commercial practices, ensure transparency and provide for redress. The global nature of electronic commerce can lead to situations where consumer protection rules may not be locally enforceable, thus potentially decreasing confidence online. With the objective of enhancing consumers' trust in digital services and the protection against deceptive practices, it is important to ensure that consumers obtain full protection within their domestic legal system.

Unsolicited commercial electronic messages (article 2.4): ETNO members support the European Commission's proposal, but suggest including an amendment in order to avoid discrimination among types of service providers and to ensure a better alignment with the EU framework enshrined in the eCommerce Directive, as follows:

> "Commercial electronic message means an electronic message, which is sent for commercial purposes ~~**using telecommunications services**~~, including at ~~least~~ electronic mail and, to the extent provided for in domestic law, other types of electronic messages."

Customs duties on electronic transmissions (article 2.5): ETNO supports the European Commission's proposal to turn the temporary moratorium into a *permanent* WTO provision.

Transfer or access to source code (article 2.6): ETNO members support the development of strong commitments to protect source code. It is important to ensure that the agreed commitments cover the transfer of source code – to a trusted entity under full reserve of business secrets – as a requirement by Member States; this may be necessary, for example, to ensure the security of critical infrastructure, as has been discussed regarding security requirements and certification procedures for 5G network equipment.

Cross border data flows (articles 2.7 and 2.8): ETNO supports the development of commitments to ensure cross-border data flows to facilitate trade in the digital economy and to prevent data localization requirements, except in very limited exceptional cases in line with GATS Article 14 and 14bis. We fully support the precautionary approach applied in the EU's General Data Protection Regulation, which imposes certain conditions for personal data to move across borders, notably Binding Corporate Rules and Standard Contractual Clauses, but also adequacy findings, enforceable codes of conducts and certification regimes. Countries that want to impose ex-ante conditions to the cross-border movement of personal data should offer transfer tools in their national data protection

[1] EU proposals for WTO disciplines and commitments relating to electronic commerce, Communications:
16 May 2018: https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157457.pdf
26 April 2019: https://trade.ec.europa.eu/doclib/docs/2019/may/tradoc_157880.pdf

laws on equal, reciprocal terms. In addition, cross-border data flows should not be restricted by requiring the localisation of data for storage or processing, except where justified on grounds of public security in compliance with the GATS principles of proportionality.

We would propose the following amendments to the text:

2.7 CROSS-BORDER DATA FLOWS
"Members are committed to ensuring cross-border flows of personal and non-personal data to facilitate trade in the digital economy, ***notably through the provision of transfer mechanisms for personal data****. To that end, cross-border data flows shall not be restricted by*

- *(a) requiring the use of computing facilities or network elements in the Member's territory for processing, including by imposing the use of computing facilities or network elements that are certified or approved in the territory of the Member;*
- *(b) requiring the localization of data in the Member's territory for storage or processing,* ***except where justified on grounds of public security in compliance with the principle of proportionality****;*
- *(c) prohibiting storage or processing in the territory of other Members;*
- *(d) making the cross-border transfer of data contingent upon use of computing facilities or network elements in the Member's territory or upon localization requirements in the Member's territory.*

In sum, WTO provisions on cross-border data flows should be in line with EU's domestic rule in Art. 4 (1) of the framework for the free flow of non-personal data in the EU (Regulation 2018/1807 on), i.e., "data localization requirements shall be prohibited, unless they are justified on grounds of public security in compliance with the principle of proportionality." Concerning the protection of personal data, cross border data flows should also be in line with Chapter V of the General Data Protection Regulation / GDPR (Regulation 2016/679), as well as in compliance with GATS Article 14.

Protection of personal data and privacy: Overall, ETNO members support the European Commission's objective in the proposed text. Data protection laws of third countries should allow for the transfer of personal data in a way comparable to the GDPR. An increasing number of countries aim to justify forced data localization under the pretext of data protection requirements. This trend should be avoided.

European industry needs a multiple-way street for the movement of personal and non-personal data: from the EU to third countries, but also from third countries into the EU and between third countries. Each country should still be able to decide on the level of protection provided for under its own laws. A homogeneous approach to data protection across countries would facilitate these movements, while the absence of data protection laws would lead to a lack of trust in e-commerce/digital trade. The European Commission should therefore engage in promoting the development of data protection regimes in third countries which do not have such laws in place.

Open Internet access (article 2.9): An Open Internet is an e-commerce issue that clearly stretches beyond network access in a digital economy. In fact, in addition to internet access providers, other providers in the value chain control access to, and distribution of, content and services, thus playing an at least equally crucial role. To this end, it is of utmost importance to ensure that gatekeepers with strong market power offer their services over the internet **under fair and transparent terms** and conditions. Until this issue is tackled under a comprehensive approach, consumers will not be able to access, distribute and use services and applications of their choice. Such services should be provided under **fair and transparent terms and conditions "by all suppliers", for level playing field purposes.**

It needs to remain legitimate to require specific technical standards and interfaces in a non-discriminatory way, so that such devices do not harm the network.

Finally, access to information on practices concerning active management of access to and distribution of services and content should be limited to those with an "impact on the quality of the Internet access".

ETNO members therefore propose a few amendments to the European Commission proposal on Open Internet access:

"Subject to applicable policies, laws and regulations, Members should maintain or adopt appropriate measures to ensure that end- users in their territory are able to:

(a) access, distribute and use services and applications of their choice available on the Internet, subject to reasonable and non-discriminatory ~~network~~ management **under fair and transparent terms and conditions by all suppliers;**

(b) connect devices of their choice to the Internet, **subject to technical requirements where necessary and** provided that such devices do not harm the network; and

(c) have access to information on the ~~**network management**~~ practices of their ~~**Internet access**~~ service supplier **concerning active management of access to and distribution of services and content that could impact the quality of experience on the internet**. **"**

Competition: ETNO welcomes the proposal from the Brazilian Delegation[2] to the WTO regarding platform competition and encourages the Commission to lend its support to their proposal:

"Members recognize that some characteristics of digital trade, such as platform-based business models, multi-sided markets, network effects and economies of scale, may pose additional challenges on competition policy. Accordingly, Members shall endeavour to:

(a) develop adequate approaches to promoting and protecting competition in digital market;

(b) strengthen collaboration mechanisms for cooperating to identify and mitigate market distortions arising from abuses of market dominance. "

Alongside this proposal, the ***economic value of data should be considered:*** data is fundamental to the overall digital economy and especially critical for the digital service providers' value chain. Data is not only an input but **has and generates economic value.** As the control of data can constitute a barrier to entry, it will be important to develop asymmetric obligations on gatekeepers allowing new players to participate in the markets, if and when a competition problem arises. For this purpose, data should be considered when analysing dominance and market power. It is also important to make it easier for consumers to switch providers and ensure that digital platforms, whether they operate locally, or from foreign jurisdictions, are subject to local consumer protection obligations.

[2] JOINT STATEMENT ON ELECTRONIC COMMERCE - COMMUNICATION FROM BRAZIL _ 9 July 2019 _ INF/ECOM/27/Rev.1 https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/27R1.pdf

Proposals related to the update of the WTO Reference Paper on telecommunications services

The Telecommunications Reference Paper agreed under the GATS includes regulatory principles (competitive safeguards, interconnection with operators, provision of universal service, transparent licensing, allocation and use of frequencies, existence of an independent regulator) that remain valid to guarantee effective market access and foreign investment commitments. ETNO members fully support the European Commission's invitation to all interested Members participating in the initiative on Electronic Commerce to commit to fully implementing the Reference Paper.

ETNO also supports the European Commission's view that the Reference paper should reflect the developments that have occurred in the market since the 1990's and therefore ensure a level playing field between the players of the digital economy value chain, and propose a few proposals aimed at reinforcing the views expressed in the EU proposal on the revision of disciplines relating to telecommunications services[3].

Definition of "interconnection" (articles 3.2 (2) and 3.4): ETNO acknowledges that the European Commission proposes a definition of interconnection based on the definition in Art. 2 (28) of the European Electronic Communications Code / EECC (Directive 2018/1972). As is the case in Europe, operators should have the right to negotiate interconnection with and, where applicable, obtain access to, or interconnection from, other providers of public electronic communications networks or publicly available electronic communications services. In any case, competent authorities shall ensure that interconnection is not a bottleneck.

Universal service (article 3.5): The revised Reference Paper should specify that the right of the parties to define the kind of universal service obligations they wish to maintain and to decide on their scope and implementation is to **avoid social exclusion**. The provision of universal service pursues a public objective and thus, designated providers must be fully compensated – and it is ETNO members' view that compensation should be based on public funds.

However, we understand that many WTO countries (including from the OECD) will continue asking for universal service contributions. ETNO therefore asks that at a minimum, the new text addresses excessive universal service fees and abuse. With regards to article 5.2 - We find that governments in third countries sometimes misdirect universal service funds to other public programs or just keep collecting without disbursing. In some cases, we experience universal service rates of up to almost 25%. Would those be considered as "more burdensome than necessary"?

Finally, and in consideration of the importance of inclusiveness for the digital economy, ETNO members maintain that the cost of universal service obligations should be ensured through public funds, **or should the costs be distributed among service providers, it should be so distributed across all providers of content and services benefiting from the infrastructure for their service provisioning.**

[3] EU proposal for WTO disciplines and commitments relating to electronic commerce: revision of disciplines relating to telecommunications services, Communication dated 15 October 2019

Licensing and Authorisation (article 3.6): ETNO takes the view that as a general principle, authorisation of telecommunications transport networks or services should be granted without a formal licencing procedure. However we understand that this is not the case in all WTO member states. Therefore the reason for denial or revocation of a licence should always be made known to the applicant/licensee in the regulator's notification, and not only upon request. Further, the applicant/licensee should have the right to appeal the regulator's decision should the reasons be deemed unfair, unreasonable or discriminatory. ETNO proposes therefore additional language as follows:

3. *An applicant for a licence shall receive the reasons for any denial of a license, revocation of a license, or refusal to renew a license, and upon request, imposition of supplier-specific conditions on a license.*

4. *The applicant/licensee shall have the right to appeal to the regulatory body or other competent independent authority in the event the aforementioned reasons do not fulfil the principles of fairness, reasonableness and non-discrimination.*

Allocation and use of scarce resources (article 3.8): The allocation and use of scarce resources should also be carried out in a proportionate manner, in order to ensure alignment with EU domestic law, i.e. Art. 45 (1) and 48 (2) of the EECC:

> "Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, shall be carried out in an objective, timely, transparent**, proportionate** and non-discriminatory manner".

In addition, the European Commission should acknowledge that both the promotion of competition and the facilitation of infrastructure investments are in the public interest, so neither should be prioritized over the other:

> "The assignment of frequency bands for public telecommunication services shall be carried out via an open process that takes into account the overall public interest, including the promotion of competition **and infrastructure investments.**"

Finally, market-based approaches are not limited to auctions, therefore the WTO should not prioritize one mechanism over the other.

Essential facilities (article 3.9): Promoting competition is an important objective of telecoms regulation, such as facilitation of infrastructure investments. The European Commission's proposal should be in line with the EECC, which specifically provides for discretion for national regulatory authorities in deciding, based on a market analysis, whether it is necessary to impose obligations on dominant suppliers in light of the general objectives of the regulatory framework (Art. 68 (2) in combination with Art. 67 (4) of the EECC). The provision should be read as follows:

> 3.9.1. "A **telecommunications regulatory authority shall impose an obligation on a** major supplier ~~**shall**~~ **to** make its essential facilities available to suppliers of public telecommunications networks or services on reasonable, transparent and non-discriminatory terms and conditions for the purpose of providing public telecommunications services, except when, on the basis of the facts collected and the assessment of the market conducted by the telecommunications regulatory authority, this is not necessary to achieve effective competition."

Resolution of disputes (article 3.10): A competent authority resolving disputes should be independent. Moreover, it is important to ensure and clarify that such decisions are without prejudice to access to

judicial review before a court, in line with Art. 26 (5) of the EECC. Therefore, the provision on resolution of disputes should clarify as follows:

> "A supplier of telecommunications network or services shall have recourse, within a reasonable and publicly available period of time, to the telecommunications regulatory authority or other competent **independent** authority to resolve disputes regarding the measures relating to matters set out in these principles. **The procedure referred to above shall not preclude either party from bringing an action before the courts**. **Members shall ensure access to independent and impartial judicial review."**

Transparency (article 3.11): The original Reference paper only provides for transparency of interconnection arrangements or reference interconnection offer. The European Commission proposal extends transparency, and publication of information, to any regulatory measure relating to public telecommunications networks or services. The EU proposal to reinforce and ensure transparency is welcomed.