

Response to DG Trade's Public Consultation on regulatory issues for a possible future EU-US trade agreement



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Executive Summary

- This position paper is ETNO's contribution to DG Trade's Public Consultation on regulatory issues for a possible future EU-US trade agreement. It stresses some aspects of the ETNO contribution to the Public Consultation on the future of EU-US trade and economic relations (September 2012) and the EU-US High level Working Group on Jobs and Growth consultation (April 2012).
- ETNO welcomes the initiative of a public consultation on regulatory issues. Indeed, EU-US trade and economic relations are heavily impacted by regulation, therefore making regulatory regimes more compatible across the Atlantic will improve the performance of both economies.

Introduction

There is a wide consensus that Information and Communication Technologies (ICTs) are a key driver of economic growth on account of their multiplier effect across all sectors of the economy, providing the foundation for global competitiveness and job creation in manufacturing, agriculture and services. ICTs have experienced a radical transformation in the last decade with the development of the Internet as a common platform where **convergent voice, data and video services are provided by a range of actors** running on top of traditional network operators and not subject to the same legacy regulations.

ETNO believes that a holistic vision with a common understanding of the ICTs ecosystem should be an objective for the EU and US Administrations and should be reflected in their approach towards a Free Trade Agreement to ensure **a level playing field among all actors** involved in the provision of ICT services. As competitive dynamics change with the entrance of new players, the goal of ensuring open markets for ICT services across the Atlantic should come in parallel with a more **flexible approach** towards the provision of telecommunications services, a stronger reliance on **ex-post application of principles of competition** law and a broader perspective on the positions of dominance that are held across the value chain.

Regulatory challenges and opportunities for the telecommunications chapter in a EU-US FTA

The EU has an active and broad trade agenda, mostly with partners that are developing economies¹. All the FTAs have been designed to create opportunities by opening new markets for goods and services, increasing and protecting investment opportunities, making trade cheaper by eliminating substantially all customs duties; making trade faster by facilitating goods' transit through customs and making the policy environment more predictable by taking joint commitments on areas that affect trade such as intellectual property rights, competition rules and the framework for public purchasing decisions.

All EU trade agreements, in place and under negotiation, have a specific chapter that applies to the telecommunication services. The objectives of this section of the agreement are to ensure the application of the provisions of the WTO Reference Paper on Basic Telecommunications related to an independent and empowered Regulatory Authority and the setting of high-level rules regarding the criteria to grant licences, competitive safeguards on Major Suppliers, Interconnection, Number Portability, Universal Service, the allocation of scarce resources, and the rights to resolve disputes among players in the sector. In definitive, following the patterns of the regulatory handbooks of the 90s, these chapters foster the creation of the appropriate institutions that would ensure the adequate climate for liberalization, allowing new entrants to enter the market

Now the EU is considering the benefits of negotiating a comprehensive agreement with the US, an economy with a very different profile than other traditional EU trading partners. In this case, the typical template used in other negotiations for an agreement on telecommunication services is no longer valid. The telecom sector in the US has been liberalized for a long time, it is very competitive and market access is fully granted. As already stated in ETNO's Position Paper on the EU US HLWG on Jobs and Growth², **there is no need to seek for additional market access**. However

¹ With the exception of Canada and Japan.

² ETNO Contribution to Public Consultation on EU – US High Level Working Group on Jobs and Growth (RD 375)
<http://www.etno.be/home/positions-papers/2012/6>

it is also a reality that while pursuing common goals such as the need to stimulate broadband deployment and adoption, the EU and the US have designed regulatory frameworks for the sector with divergent approaches and results: in the EU, the implementation of the 2003 Regulatory Framework has been strongly conditioned by objectives (such as direct regulation of retail and wholesale prices) geared towards promoting competition based on network access by new entrants. Meanwhile, the US has decided to free up investments in new infrastructures from sector regulation to foster a model of infrastructure based competition based on multiple competing platforms (i.e. Cable, FTTH, Mobile, and Satellite). The issues at stake are high, as the regulatory framework will have a crucial impact on the decision from operators to invest in the deployment of very high-speed networks, particularly at the access level. These divergences will have to be tackled in the EU-US FTA negotiations as they have consequences in terms of the classification of telecommunication services and the regulatory obligations associated to them. In this sense, ETNO members see the FTA negotiations as an opportunity for the EU and the US to converge on a common vision for the sector that would promote a flexible and investment-friendly environment **with less focus on the use of the incumbent's legacy networks through regulated access and more emphasis on dynamic outcomes such as investment and innovation.**

The EU and the US have an opportunity through an FTA to offer a forward looking perspective and align their visions of the broader ICT sector. The EU US trade negotiations should define the goals that would leverage the potential of the communications ecosystem to become a further source of investment, innovation, growth and jobs, higher productivity and competitiveness. This broader perspective implies the definition of broader digital strategies.

This was already clear when the EU and the US agreed on a set on ICT principles³ in 2011 that was intended to be implemented within their bilateral economic relationship and in their trade negotiations with third countries. ETNO calls both governments to further develop these principles and enshrine them on a possible EU-US FTA with a particular focus on the following aspects:

- **Commercial Flexibility should be added to the principle of Openness:** On account of the new competitive scenario for the provision of ICT services the EU and the US should not only promote the ability of consumers to legitimately access and distribute information and run applications and services of their choice, but also ensure the ability of connectivity suppliers to manage their networks, develop new business models and supply services, including convergent and multiple-play services, on a cross-border, technology neutral basis. This dynamic commercial environment is necessary to allow new business models that are able to support the next level of investment in infrastructure.
- **The principles should put more focus on oversight and less on price regulation for interconnection.** The process of liberalisation has led to competitive market structures for the provision of telecommunication

³ European Union-United States Trade Principles for Information and Communication Technology Services
http://ec.europa.eu/information_society/activities/internationalrel/docs/eu-us-tradeprinciples.pdf

services in the EU and the US. At the same time, the Internet has evolved into a common platform where **convergent voice, data and video services are provided by a range of actors** running on top of traditional network operators. Interconnection in the Internet platform is fundamentally different from the circuit switch interconnection of the Public Switched Telecommunications Networks that prevailed at the time when the GATS and the Reference Paper on Basic Telecoms were adopted. Challenges are now associated to the exponential growth in data traffic and the need for connectivity providers to develop new business models based on commercial agreements that generate new sources of revenue necessary to fund investments in infrastructure. In this context, instead of focusing on cost oriented rates, the ICT Trade Policy Principles should rely on the existing market-based frameworks for exchanges of Internet traffic subject to the oversight of competition authorities.

Other issues

ETNO would like to recall its contribution⁴ to the Public Consultation on the future of EU-US trade and economic relations and the topics already covered in that document:

- The potential to articulate the EU-US FTA as a tool to address trade issues with third countries, by the means of improving their governance, by fostering competition in their markets and by collaborating on creating level-playing fields.
- Reducing the negative impacts of fragmentation of the US internal market. The same shall apply in Europe, regarding the fragmented national regulatory schemes from Member States.

⁴ ETNO Contribution 2012/09 – “Response to DG Trade’s Public consultation on the future of EU-US trade and economic relations”
<http://www.etno.be/home/positions-papers/2012/155>