



## JOINT STATEMENT ON ELECTRONIC COMMERCE

### EU PROPOSAL FOR WTO DISCIPLINES AND COMMITMENTS RELATING TO ELECTRONIC COMMERCE

#### *Communication from the European Union*

The following communication, dated 26 April 2019, is being circulated at the request of the delegation of the European Union.

## 1 INTRODUCTION

1. The EU is fully committed to ongoing WTO negotiations on e-commerce. In this context, it will seek to negotiate a comprehensive and ambitious set of WTO disciplines and commitments, to be endorsed by as many WTO Members as possible. The EU supports the open, transparent and inclusive character of these negotiations.
2. To this end, the EU proposes to negotiate a series of WTO disciplines and commitments relating to electronic commerce and telecommunications services, aiming to enhance regulatory predictability and improve market access conditions, to be incorporated in the schedules of the individual Members.
3. The EU and its Member States maintain the possibility to define and implement cultural and audio-visual policies for the purposes of preserving their cultural diversity, including by not taking commitments on audio-visual services.
4. This proposal is without prejudice to the EU position with respect to the final negotiated outcome, which in some cases may depend on the level of support for individual provisions.
5. The EU reserves the right to table additional text proposals on other issues in the course of the negotiations.

## 2 TEXT PROPOSALS FOR THE WTO RULES ON E-COMMERCE

### 2.1 ELECTRONIC CONTRACTS

1. Members shall ensure that contracts may be concluded by electronic means and that their legal systems neither create obstacles for the use of electronic contracts nor results in contracts being deprived of legal effect and validity solely on the ground that they have been made by electronic means.
2. Paragraph 1 does not apply to broadcasting services, gambling services, legal representation services, to services of notaries or equivalent professions involving a direct and specific connection with the exercise of public authority, and to contracts that establish or transfer rights in real estate, contracts requiring by law the involvement of courts, public authorities or professions exercising public authority, contracts of suretyship granted and or collateral

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securities furnished by persons acting for purposes outside their trade, business or profession and contracts governed by family law or by the law of succession.

## 2.2 ELECTRONIC AUTHENTICATION AND ELECTRONIC SIGNATURES

### **Definitions**

**Electronic authentication** means the process or act of verifying the identity of a party to an electronic communication or transaction, or ensuring the origin and integrity of data in electronic form.

**Electronic signature** means data in electronic form, which is attached to or logically associated with other data in electronic form that:

- (a) is used by a natural person to agree on the data to which it relates; or
- (b) is used by a juridical person to ensure the origin and integrity of the data to which it relates; and
- (c) ensures that any subsequent change in the data to which it relates is detectable.

### **Provision**

1. Members shall not deny legal effect and admissibility as evidence in legal proceedings of electronic signature solely on the basis that it is in electronic form.
2. Members shall ensure that parties to an electronic transaction are not prevented from:
  - (a) mutually determining the appropriate electronic authentication methods for their transaction;
  - (b) being able to prove to judicial and administrative authorities that the use of electronic authentication or an electronic signature in that transaction complies with the applicable legal requirements.
3. Notwithstanding paragraph 2, certification requirements by an authority accredited in accordance with domestic law or certain performance standards may apply for a particular category of transactions, the method of authentication or electronic signature. Such requirements and standards shall be objective, transparent and non-discriminatory and shall only relate to the specific characteristics of the category of transactions concerned.
4. To the extent provided for under domestic law, Members shall apply paragraphs 1 to 3 to other electronic processes or means of facilitating or enabling electronic transactions, such as electronic time stamps, electronic registered delivery services or website authentication.

## 2.3 CONSUMER PROTECTION

1. Recognising the importance of enhancing consumer trust in electronic commerce, Members shall adopt and maintain measures that protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce transactions.
2. Additionally, Members should consider adopting or maintaining measures that:
  - (a) require traders to act in good faith;
  - (b) require traders to provide accurate information on the goods or services and the terms of the contract; and
  - (c) grant consumers access to redress.

3. Members recognise the importance of cooperation between their consumer protection agencies or other relevant bodies in order to protect consumers and enhance online consumer trust.

## 2.4 UNSOLICITED COMMERCIAL ELECTRONIC MESSAGES

### **Definition**

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

### **Provision**

1. Members shall adopt and maintain measures that protect consumers against unsolicited commercial electronic messages. To this end:
  - (a) the recipient's consent shall be required, as specified according to the laws and regulations, to receive commercial electronic messages; or
  - (b) suppliers of commercial electronic messages shall be required to facilitate the ability of recipients to prevent ongoing reception of such messages.
2. Members shall provide access to redress against suppliers of unsolicited commercial electronic messages who do not comply with the measures implemented pursuant to paragraph 1.
3. Members shall ensure that commercial electronic messages are clearly identifiable as such and clearly disclose on whose behalf they are sent.

## 2.5 CUSTOMS DUTIES ON ELECTRONIC TRANSMISSIONS

Members shall not impose customs duties on electronic transmissions, which include the transmitted content.

## 2.6 TRANSFER OR ACCESS TO SOURCE CODE

1. Members shall not require the transfer of, or access to, the source code of software owned by a natural or juridical person of other Members.
2. For greater certainty:
  - (a) the general exception, the security exception as well as the exceptions in the paragraph 2 of the GATS Annex on Financial Services apply to measures adopted or maintained in the context of a certification procedure;
  - (b) paragraph 1 does not apply to the voluntary transfer of or granting of access to source code on a commercial basis by a natural or juridical person, for instance in the context of a public procurement transaction or a freely negotiated contract.
3. Paragraph 1 is without prejudice to:
  - (a) requirements by a court, administrative tribunal, or by a competition authority to remedy a violation of competition law;
  - (b) the protection and enforcement of intellectual property rights; and
  - (c) the right to take any action or not disclose any information that is considered necessary for the protection of essential security interests relating to the procurement of arms,

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ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

## **2.7 CROSS-BORDER DATA FLOWS**

1. Members are committed to ensuring cross-border data flows to facilitate trade in the digital economy. 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;
- (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.

## **2.8 PROTECTION OF PERSONAL DATA AND PRIVACY**

1. Members recognize that the protection of personal data and privacy is a fundamental right and that high standards in this regard contribute to trust in the digital economy and to the development of trade.
2. Members may adopt and maintain the safeguards they deem appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in the agreed disciplines and commitments shall affect the protection of personal data and privacy afforded by the Members' respective safeguards.
3. Personal data means any information relating to an identified or identifiable natural person.

## **2.9 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;
- (b) connect devices of their choice to the Internet, 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.

## **3 REVISION OF THE WTO REFERENCE PAPER ON TELECOMMUNICATIONS SERVICES**

The EU proposes that the following set of disciplines replaces the WTO reference paper on telecommunication services.

### **3.1 Scope**

1. The following are definitions and principles on the regulatory framework for public telecommunications transport services.
2. For the purposes of these principles, public telecommunications transport services shall include, *inter alia*, data transmission services and leased circuit services.

### 3.2 Definitions

For the purpose of these principles:

1. "essential facilities" means facilities of a public telecommunications transport network or service that
  - (a) are exclusively or predominantly provided by a single or limited number of suppliers; and
  - (b) cannot feasibly be economically or technically substituted in order to provide a service;
2. "interconnection" means linking with suppliers of public telecommunications transport networks or services in order to allow users of one supplier to communicate with users of the same or another supplier or to access services provided by the suppliers involved or any other supplier who has access to the network;
3. "major supplier" means a supplier of public telecommunications transport networks or services which has the ability to materially affect the terms of participation (having regard to price and supply) in a relevant market for public telecommunications services as a result of:
  - (a) control over essential facilities; or
  - (b) use of its position in the market;
4. "network element" means a facility or equipment used in supplying a telecommunications service, including features, functions and capabilities provided by means of that facility or equipment;
5. "telecommunications regulatory authority" means the body or bodies charged by a Member with the regulation of public telecommunications transport networks and services covered by these principles;
6. "user" means any natural or juridical person using a public telecommunications transport service.

### 3.3 Competitive safeguards

1. Appropriate measures shall be maintained for the purpose of preventing suppliers of public telecommunications transport networks or services who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.
2. The anti-competitive practices referred to in paragraph 1 shall include in particular:
  - (a) engaging in anti-competitive cross-subsidization;
  - (b) using information obtained from competitors with anti-competitive results; and
  - (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

### 3.4 Interconnection

1. Interconnection with a major supplier shall be ensured at any technically feasible point in the network. Such interconnection shall be provided.
  - (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of its subsidiaries or other affiliates;

(b) in a timely fashion, on terms and conditions (including rates, technical standards and specifications) that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2. The procedures applicable for interconnection to a major supplier shall be made publicly available.
3. Major suppliers shall make publicly available either their interconnection agreements or a reference interconnection offer.

### **3.5 Universal service**

1. Any Member has the right to define the kind of universal service obligations it wishes to maintain and to decide on their scope and implementation.
2. Universal service obligations shall be administered in a transparent, objective and non-discriminatory manner, which is neutral with respect to competition and not more burdensome than necessary for the kind of universal service defined by the Member.
3. The designation of universal service suppliers shall be made through an efficient, transparent and non-discriminatory mechanism that is open to all suppliers of public telecommunications transport networks or services.
4. Where suppliers of public telecommunications transport networks or services are compensated for the provision of universal service, such compensation shall not exceed the financial needs directly attributable to the universal services obligations.

### **3.6 Licencing and Authorisation**

1. Authorisation to provide public telecommunications transport networks or services should in principle be granted without a formal licencing procedure, so that the supplier may start providing its networks or services without having to wait for a decision by the telecommunications regulatory authority.
2. Where a licence is required, the following shall be made publicly available:
  - (a) the types of networks or services requiring a licence;
  - (b) all the licencing criteria, applicable procedures and the period of time normally required to reach a decision concerning an application for a licence; and
  - (c) the terms and conditions of individual licences.
3. An applicant for a licence shall receive, on request, the reasons for any denial of a license, imposition of supplier-specific conditions on a license, revocation of a license, or refusal to renew a license.

### **3.7 Telecommunications Regulatory Authority**

1. The telecommunications regulatory authority shall be separate from, and not accountable to, any supplier of public telecommunications transport networks or services. To this end, the telecommunications regulatory authority shall not hold a financial interest or maintain an operating or management role in any such supplier.

2. Tasks shall be assigned by law to the telecommunications regulatory authority to enforce the obligations set out in these principles, and shall be made public in an easily accessible and clear form.
3. The telecommunications regulatory authority shall have the power, including the ability to impose sanctions, to carry out the tasks assigned to it by law. Such power shall be exercised transparently and in a timely manner.
4. The decisions of and the procedures used by the telecommunications regulatory authority shall be impartial with respect to all market participants.

### **3.8 Allocation and use of scarce resources**

1. 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 and non-discriminatory manner.
2. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.
3. The allocation of frequency bands for public telecommunication transport services shall be carried out via an open process that takes into account the overall public interest, including the promotion of competition. Such allocation shall in principle be carried out using market-based approaches, including through mechanisms such as auctions where appropriate.

### **3.9 Essential Facilities**

1. A major supplier shall make its essential facilities available to suppliers of public telecommunications transport networks or services on reasonable, transparent and non-discriminatory terms and conditions for the purpose of providing public telecommunications transport 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.
2. The telecommunications regulatory authority shall be empowered to:
  - (a) determine those essential facilities required to be made available by a major supplier;
  - (b) require a major supplier to offer access on an unbundled basis to its network elements that are essential facilities.

### **3.10 Resolution of Disputes**

A supplier of public telecommunications transport network or services shall have recourse, within a reasonable and publicly available period of time, to the telecommunications regulatory authority or other competent authority to resolve disputes regarding the measures relating to matters set out in these principles.

### **3.11 Transparency**

Further to Article 4 of the GATS Annex on Telecommunications and to other dispositions in these principles pertaining to publication of information, any measure relating to public telecommunications transport networks or services shall be made publicly available.

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## 4 MARKET ACCESS REQUESTS

### 4.1 Information Technology Agreement and Information Technology Agreement Expansion

The EU requests that other Members join the Information Technology Agreement and its expansion.

### 4.2 COMPUTER SERVICES

1. The EU requests that other Members make commitments on computer services in accordance with the following:
  - (a) **Mode 1-3:** Full market access and national treatment commitments in modes 1- 3 for the sector as a whole (CPC84, 2-digit based), with no limitations.
  - (b) **Mode 4:** No exclusion of computer and related services from horizontal Mode 4 commitments. No additional limitations beyond horizontal limitations, at least for Intra-corporate transferees (ICTs).
2. The EU requests that other Members to commit to the Understanding on computer and related services (S/CSC/W/51).

### 4.3 TELECOMMUNICATION SERVICES

The EU requests that other Members make commitments on telecommunications services in accordance with the following:

1. **Sectoral Coverage:** Commitments should have commercially meaningful coverage of all subsectors listed in 2.C. of MTN.GNS/W/120, in particular fixed and mobile voice and data transmission services, leased circuit services (through any means of technology), and value-added services.
2. **All subsectors:**
  - (a) **Mode 1:** No national treatment limitations and no substantial market access limitations, specifically:
    - No unbound;
    - No requirement to use networks of specific suppliers;
    - No requirement of commercial presence; and
    - No requirement for commercial arrangements.
  - (b) **Mode 2:** No market access or national treatment limitations.
  - (c) **Mode 3:** No national treatment limitations and no substantial market access limitations, specifically:
    - No limitations on the establishment or number of service suppliers (e.g. quotas, exclusive service suppliers, or geographic restrictions within a Member's territory);
    - No economic needs tests;
    - No restrictions on the types of legal entity permitted;
    - No limitations on nationality or residency; and
    - Majority foreign capital participation and effective control to be allowed.



- (d) **Mode 4:**
- No additional limitations beyond horizontal limitations, at least for Intra-corporate transferees (ICTs);
  - No exclusion of telecommunications services from horizontal Mode 4 commitments.
3. **All telecommunications services provided on a non-facilities or resale basis:** no limitations on Modes 1 to 3.
4. **Subsectors 2.C.h. to 2.C.n. in MTN.GNS/W/120:** no limitations on Modes 1 to 3.
5. **MFN Exemptions:** Removal of all MFN exemptions.
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