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The CETA-agreement on telecommunication services – A blueprint for a future WTO accord in multilateral trade liberalisation?

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**The CETA-agreement on telecommunication services – A blueprint for
a future WTO accord in multilateral trade liberalisation?**

By

Markus Fredebeul-Krein

Preliminary draft

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Abstract -

In February 1997 WTO members signed the Fourth protocol, which, for the first time, determined a set of international rules for trade in basic telecommunication services. While this agreement was a major step in the direction of liberalising national telecommunication markets, many deficiencies remained. At the time, it was agreed to enter a new round of negotiations by the year 2000. However, 20 years later, as of today, the former rules are still in place without any revision. While this is rather disillusioning from a free trade perspective, progress has been made on bilateral trade agreements. One such agreement is the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, which provisionally entered into force on 21 September 2017. CETA, that includes two Chapters affecting telecommunications markets, one on services in general and one on telecommunications services, envisages amongst others to further open up service markets to foreign companies by lifting existing market entry barriers.

It is the objective of this paper to analyse whether the CETA-agreement on telecommunications services can serve as a blueprint for a future WTO accord towards multilateral trade liberalisation. In answering this question, the results of the CETA-agreement on telecommunication services will be compared with the results of the WTO accord on telecommunications services. Thereby the focus will be on the question whether CETA can serve as model for a future revision of the WTO rules in the area of telecommunications services. Is CETA a major step in the direction of further liberalising national telecommunication markets and are the regulatory provisions detailed enough to make competitive market access become reality?

Keywords: regulation, liberalisation, telecommunication communications markets, WTO, CETA

I. Introduction

On 21 September 2017 the bilateral free trade agreement “CETA” (Comprehensive Economic and Trade Agreement), signed one year before between the EU and Canada, entered into force. CETA, that includes two Chapters affecting telecommunications markets, one on services in general and one on telecommunications services, envisages to further open up service markets to foreign companies by lifting existing market entry barriers. 20 years before, on 15 February 1997, 72 WTO-members agreed on liberalising telecommunications markets on a global scale. Recognising the growing importance of a multilateral framework for trade in services, they signed the so-called Fourth Protocol, which, for the first time, determined a set of international rules for trade in basic telecommunication services. While the agreement was a major step in the direction of reducing market access barriers on telecommunication markets, many deficiencies

remained. Although WTO members agreed to enter a new round of negotiations, more than 20 years later, as of today, the former rules are still in place and no revision of the agreement has been made.

This paper analyses the results of the CETA-agreement with respect to telecommunication services and compares them with the achievements of the WTO accord on telecommunications services. In doing so the key question is whether CETA can serve as model for a future revision of the WTO rules. Is CETA a major step in the direction of liberalising national telecommunication markets on a global scale and are the regulatory provisions detailed enough to ensure open and non-discriminatory market access of foreign suppliers?

The paper is organised as follows. In the second section, the need for design of international rules on the cross-border provision of telecommunication services is briefly discussed. The third section examines the WTO Agreement with respect to telco services. It includes a subsection on remaining trade barriers in telecommunications services following the entry into force of the WTO accord. The fourth section analyses the results of the CETA agreement with respect to telecommunications services. The fifth section will then assess in how far these CETA provisions can serve as a model for a future revision of the WTO rules in this sector. Do they overcome the shortcomings of the WTO accord on basic telecommunications services? The paper will conclude with some final remarks on the merits of CETA.

II. Economic Aspects of the Internationalisation of Telecommunication

On telecommunications markets national sector policies and processes are continuously adapted due to ongoing technological innovations. Markets facing such technological, economic and political changes require a proper international framework which facilitates trade and which reduces the risk of governments acting in a protectionist manner. Two dimensions for rule setting are important in this respect: 1) market access rules and 2) rules for national regulatory policies.

1. Market access rules

High on the agenda of any international trade agreement is the issue of market access for foreign investors to national telecommunication markets. In most instances, telecom services are provided through networks, which are installed in the country where the service is offered. Therefore, commercial presence in foreign countries is the preferred mode of delivery for most telecom services.¹ International rules which allow for foreign direct investment and/or the establishment of foreign service providers are thus a key requirement for effective market access.

A very restrictive market entry barrier is when a country prohibits foreign ownership in national telecommunications networks. Should foreign suppliers not be allowed to use their own facilities for the provision of services, they face significant costs when using the network of their rivals.² Other trade barriers are restrictions on foreign direct equity stakes in domestic telecom companies, limitations on mergers and acquisitions for foreign firms, restrictions on the resale of existing network capacity, the control of the number of firms that may operate by economic needs tests or quotas, and the imposition of nationality or residence requirements for board members.

Better market access by allowing unrestricted foreign establishment and foreign ownership of domestic telecom firms is therefore one of the most important negotiating issues within any free trade agreement. Enabling this mode of supply requires the application of key trade principles such as market access (commitments not to impose quantitative barriers), national treatment (commitments not to discriminate investors of the other Party), transparency (commitments to publish all relevant information) and most favoured nation treatment (m.f.n., commitments to extend to the other Party any more favourable treatment that would be provided to a third party).

2. International rules for national regulatory policies

To facilitate the international provision of telecommunication services, commitments to open national markets are not on their own sufficient to assure non-discriminatory market access in practice. Due to competition failure in telecommunications markets (economies of scale, economies of scope, network externalities and switching costs) countries have national regulatory frameworks in place in which specific regulatory instruments provide safeguards against unfair competition and market power (Bauer, 2010). Amongst others, these rules include provisions on network access and interconnection as well as on competitive safeguards against the abuse of market power. Depending on which regulations countries implement, they can undermine market access and national treatment commitments, which is why precise international rules for the regulation of telecom markets are required. Two examples:

1) **Network Access and Interconnection.** Since new operators do not own a nation-wide telecommunications network, they depend upon interconnecting their network with the network of the incumbent. The incumbent, on the other hand, has no incentive to allow new market entrants to access its network, which is why regulations are necessary in order to enable competitors non-discriminatory network access. Otherwise, the established operator could prevent or at least hamper the market entry of new providers. The particular rules on access regulation to be applied in a country depend on the degree of competition that has developed (Lestage and Flacher, 2014). A key element of any policy

regime is, however, that the rules provide fair and equitable terms for network access. For that they must be transparent and based on objective criteria. In addition, network access must be provided at cost-oriented rates to prevent operators from charging prohibitive interconnection rates from their competitors.

2) **Competitive safeguards.** Years after liberalising telecom markets, former monopolists are still able to misuse dominant market positions, especially with respect to bottleneck resources (Faulhaber, 2005). They may use these profits to cross-subsidise telecommunications services offered on competitive markets. In order to prevent such anti-competitive practices the market power of dominant operators has to be regulated. A trade framework should thus include a concept of dominant position with clear rules precluding arbitrariness in tariffication. The potential misuse of market power is particularly high when carriers are not required to create separate subsidiaries with independent administration and accounting operations for the services they offer.

Besides stimulating competition, regulatory rules also aim at pursuing non-economic policy objectives: National security, public safety and consumer protection are some of the objectives governments pursue when regulating telecom markets. Governments find themselves often in a conflict situation. On the one hand they have a legitimate interest in issues such as environmental and consumer protection. On the other hand they aim at encouraging open and competitive markets. Certain types of regulations explicitly pursue the realization of non-economic policy goals. On telecommunications markets such regulations can be found with respect to 1) authorizations, 2) scarce resources and 3) universal services. When designing these regulations attention must be given that they do not constitute a hidden form of protectionism.

1) **Authorisation and Scarce Resources.** Countries usually require some form of authorisation for the provision of telecom services, either a simple notification or a license or anything in between. One reason for requiring an authorisation are scarce resources such as frequencies (being particularly important for mobile services), which make it necessary to restrict the number of suppliers in some markets. Should a supplier need to have a license, the applicant has to meet various criteria. Depending on their content and on how they are applied, they may constitute a barrier to entry. An extreme form of entry barrier is a limitations on the number of licences granted, which can be misused by governments to discriminate against foreign firms. A weaker form of entry barrier is when secondary spectrum trading is not allowed.

2) **Universal Services.** In view of guaranteeing basic users' interests not achieved by market forces, most countries have implemented regulations on the provision of "Universal Services". Depending upon the actual framework chosen, the universal service

obligation impedes market access for potential (foreign) competitors. How strong the effect of a particular universal service obligation upon market entry is, depends on the scope and prices of the universal service, the number of universal service providers, and on how and by whom the universal services are financed (Intven, 2000). For instance, an incumbent may gain from fulfilling universal service obligations by receiving financial contributions which have the effect of a tax on entrants. An international trade agreement on telecom services needs to specify rules for the different aspects of national universal service obligations.

Any international agreement aimed at setting rules for fair access to national telecommunication markets has therefore to deal with regulatory aspects in telecommunication. Specific guidelines need to be set up to ensure that national telecom suppliers are not given an advantage over foreign competitors by national regulatory bodies.

III. Telecommunications services in the WTO

1. The WTO agreement on Telecommunications

As part of the Marrakesh agreement that resulted from the Uruguay Round in 1995, WTO members agreed upon the General Agreement for Trade in Services (GATS). The GATS is based on three pillars.

- a) A framework agreement, which lays down fundamental obligations for all the member countries on trade in services,
- b) schedules of specific commitments by members to reduce market access barriers and to treat service suppliers of other members no less favourably than they treat their own service suppliers, and
- c) several annexes dealing with the situations of specific service sectors. One of these Annexes is the so called “Fourth Protocol to the General Agreement on Trade in Services”, which entered into force in February 1998. The Protocol amends or supplements the schedules of specific commitments and lists of exemptions set out in Article II of the GATS.

The general GATS principles (Part II of GATS) include most favoured nation treatment and transparency and are compulsory for all WTO Members. In contrast, the specific commitments have to be met only by those WTO Members, which record their commitments for a service in sector and country specific national schedules. These commitments are subject of continuing liberalisation.

a) General obligations on most favoured nation and transparency

The WTO agreement contains two key general obligations relevant for the telecommunication sector: 1) a basic most-favoured-nation (m.f.n.) obligation and 2) transparency requirements. The m.f.n. clause states that each party "shall accord immediately and unconditionally to services and service providers of any other party, treatment no less favourable than that it accords to services and service providers of any other country" (WTO, 1995, p. 329). The m.f.n. principle has its merits in terms of trade facilitation because it prohibits discrimination of foreign suppliers against other foreign suppliers.³ As to basic telecommunications services, which are part of the Fourth Protocol, WTO member states were allowed to limit the application of the m.f.n. principle by listing a m.f.n. exemption on a measure affecting trade in these services.

GATS article III on transparency requires all WTO members to publish all relevant laws and regulations. The annex on telecommunications further specifies this obligation. All information on regulatory bodies, tariffs, access to distribution channels and information networks, technical interface requirements and requirements for notification, registration and other forms of recognition foreign service suppliers need have to be published. The principle of transparency is a key element for promoting stability and predictability of the international trading system. Given that WTO members are forced to disclose potential barriers of market access the principle has a disciplinary effect on them.

b) Specific obligations on market access and national treatment

The GATS provisions on market access (article XVI) and national treatment (article XVII) are commitments on specific services made in national schedules. In the case of market access, each party "shall accord services and service providers of other parties treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule".⁴ The intention of the market-access provision is to progressively reduce market access restrictions such as the limitations on numbers of service providers or foreign capital limitations relating to maximum levels of foreign participation. The national-treatment provision contains the obligation to treat foreign service suppliers and their goods no less favourably than domestic service suppliers and their goods.

As to basic telecommunications services the fourth protocol enables foreign companies to provide local, long-distance and international services, including all voice and data services, through any means of network technology. Foreign suppliers are since then allowed to build their own facilities to compete with established operators and to resale existing network capacity (over private leased circuits). Regarding foreign investment, the commitments cover services provided through the establishment of foreign firms, or

commercial presence, including the ability to acquire shares in domestic telecom operators. When the agreement entered into force in 1998, 56 countries permitted foreign ownership or control of all telecommunications services and facilities (also the EU countries). Some countries - amongst them Canada - restricted foreign ownership for certain domestic telecom operators, but permitted substantial foreign investment in them.

In order for the commitments on market access and national treatment to become effective WTO members had to agree in national schedules if they want to apply the commitments to a particular basic telecommunications service. In these schedules - annexed to the Fourth Protocol - each member state had to list for each services exemptions from the principles of market access restrictions and national treatment.

c) Reference Paper

Besides specific commitments on market access and national treatment, the fourth Protocol also contains a so-called “Reference Paper”, in which 67 countries agreed to a specific set of regulatory principles that are aimed at ensuring fair competition in national telecom markets. The rules of this paper specify provisions on competitive safeguards, interconnection, universal service, public availability of licensing criteria, independent regulators and the allocation and use of scarce resources.

2. An analysis of what has been achieved as a result of the WTO accord

It can be acknowledged that the WTO commitments laid the foundations for a pro-competitive regulation of telecommunications services (Fredebeul-Krein and Freytag, 1999). The agreement opened 90 percent of telecom markets in terms of revenue, and commitments on foreign investment and market access were based on three cornerstone trade concepts: the m.f.n. principle, the market access, and the national treatment principle. These rules have enhanced certainty, security and predictability which is particularly important for foreign suppliers. The principles laid down in the GATS and the annex on telecommunications define how to open, or to keep open, telecom markets.

Merits of the WTO accord on telecommunications services stem also from the fact that the liberalisation commitments codify unilateral steps, which members have already taken to open their markets. Moreover, members are no longer allowed to adopt any new restrictive measures with a protectionist effect. Furthermore, in the Reference Paper of the Fourth Protocol many governments made commitments to a regulatory regime that has the effect of diminishing regulatory uncertainties. Participating countries must make their regulations transparent, including clear statements of prices charged for the use of networks. These transparency obligations have the effect of preventing national regulators from acting in an arbitrary manner.

Yet, neither the general and specific GATS obligations nor the regulatory provisions of the Reference Paper were sufficient for making the market access commitments in the telecom sector fully effective (Fredebeul-Krein/Freytag, 1999). The main shortcomings of the WTO accord on telecommunications services can be summarized as follows. First, the schedules of the Fourth Protocol allow for many exemptions, which weaken the effectiveness of liberalisation commitments. The undermining of GATS rules by positive and negative lists has enabled WTO members to protect their national telecom markets against foreign competition. Second, the language of the GATS and the Fourth Protocol is rather general in nature, which allows WTO members to interpret the various provisions according to their needs. This can have the effect of ongoing market protections should a member intends to do so. Last, the regulatory provisions are neither specific enough nor comprehensive enough to ensure open market access (Fredebeul-Krein and Freytag, 1999). Subsequently the most prominent deficiencies are listed.

1) Competitive safeguards

- No specification of mechanisms for addressing potential anti-competitive practices.
- Major suppliers are not required to create separate subsidiaries with independent administration and accounting operations.
- There is no rate-setting approach requiring upper limits on tariffs that dominant firms can charge in those segments of the market they control.

2) Interconnection

- It is not further specified on which criteria the interconnection charges have to be based, cost-oriented rates may become difficult to realise in practice.
- While dispute settlement mechanism is foreseen in case of conflicts on the terms and conditions for interconnection, details are not further specified.

3) Universal service

- Members can define any kind of obligation they wish to maintain in this area.
- Neither are there any provisions on the number of services that operators are required to offer nor on the prices they have to charge for the services.
- No specification on the number of operators which have to offer universal services.

4) Licensing criteria

- No specifications as regards the situations in which a licence can be required for market and no upper limit for potential licence fees.
- Allowance to restrict the number of licences (in the case of scarce resources).
- No provisions on terms and conditions for individual telecommunications licences.
- When taking a decision on licensing within a “reasonable period of time”, it is not further specified what is meant by reasonable period.

5) Independent regulator

- No requirement as to enforcement power of regulatory authority.

6) Allocation and use of scarce resources.

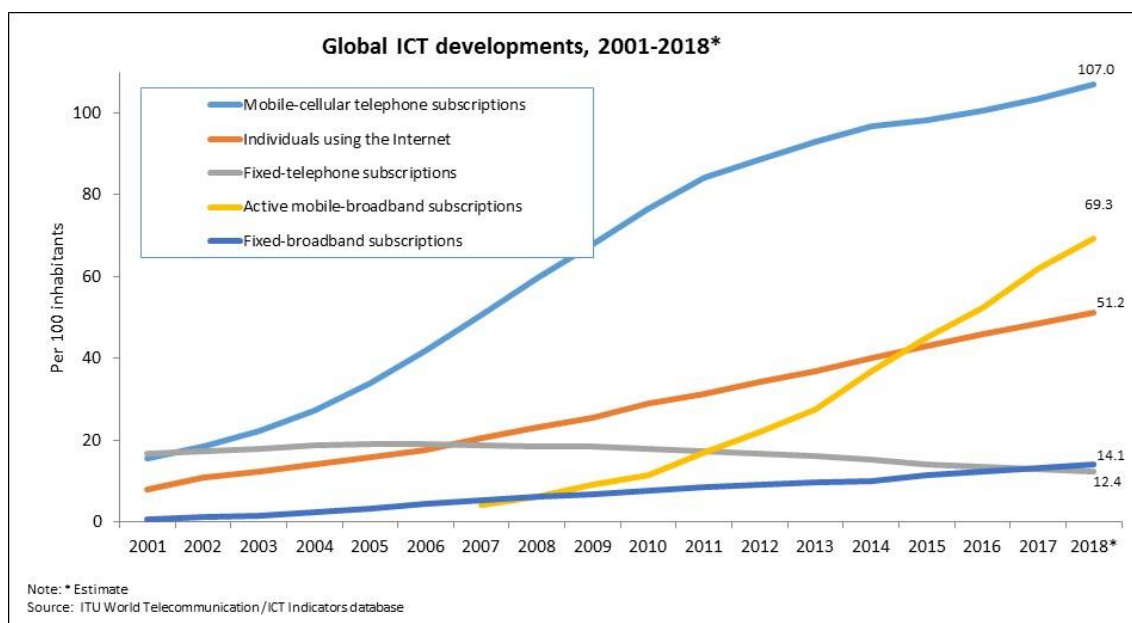
- Rules on the actual policies of allocating scarce resources have not been provided.

Members of the WTO were aware of the deficiencies of the WTO accord on services. In November 2001 they officially launched a new round of negotiations on trade liberalisation. In the so-called “Doha-Round” services, including telecommunications services, became officially part of the negotiation agenda. Additional market opening as well as the binding of recent reforms (i.e. a commitment not to increase a rate of duty beyond an agreed level) in telecommunications was formulated as an objective of many WTO members. In July 2008, 39 governments had made offers to improve their existing commitments or to commit for the first time in the telecommunications sector. Yet, as of today, the Doha Round did not bring about any substantial results in the telecom area. To the contrary, the future of the Doha Round remains more uncertain than ever.

The Fourth Protocol on the liberalisation of markets for basic telecommunications services as adopted in 1997 is therefore still in place. The only progress having achieved so far is that more countries have signed the document. As of today 108 WTO members have made commitments to facilitate trade in telecommunications services by applying key trade principles as laid down in GATS and the Fourth protocol. Out of this, 99 members have made commitments to foster competition in basic telecommunications (27 countries more than in 1997) and 82 WTO members have committed to the regulatory principles of the “Reference Paper” (plus 15 countries) (WTO, 2019).⁵

3. Empirical evidence on existing trade restrictions in telecommunications services

Open and competitive telecommunications markets are strongly associated with higher penetration rates and lower prices of telecommunications services. Empirical evidence confirms the positive effect of liberalising telecom markets. In the years that followed the WTO accord on basic telecommunications services foreign direct investment in the expansion and upgrading of national telecommunication networks and services was stimulated. As a result subscription rates increased significantly in all market segments (see graph below). Moreover, competition in telecoms markets increased worldwide, resulting in substantial price reductions for telecom services. According to a survey by ITU, prices for mobile-cellular and fixed-broadband services have declined on a global scale by more than 50 percent between 2008 and 2016, the liberalisation of telecom markets including trade facilitation being a major reason (ITU, 2018).



Source: ITU, 2019

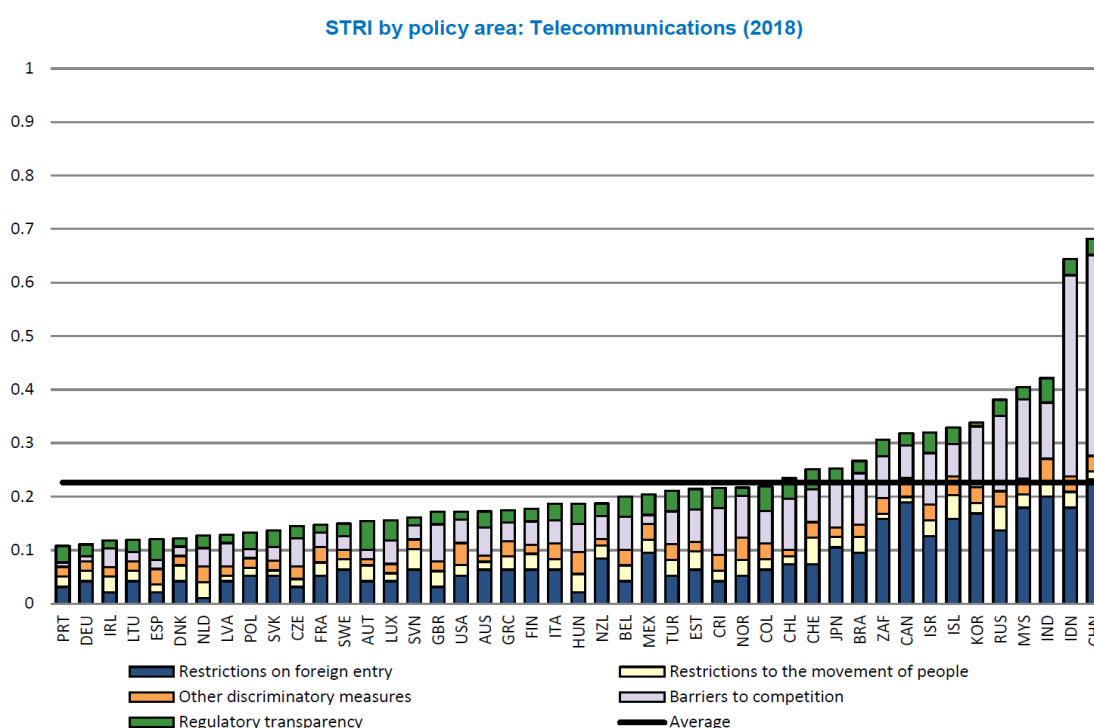
In 2007 the OECD Trade Committee launched an “OECD Services Trade Restrictiveness Index (STRI) project”, a tool that quantifies barriers to trade in different service sectors (OECD, 2007). Based on an analysis of national laws and regulations affecting international trade in services, numerical values on trade barriers are derived for all member countries and some other large countries (Brazil, China, India, Indonesia, Russia, South Africa). The STRIs take values between zero and one, one representing a totally closed and zero a fully open sector. For telecommunications services such an STRI was presented for the first time in 2014 (Nordas et al., 2014). It covers five policy areas of potential trade restrictions: 1) restrictions on foreign ownership and other market entry conditions, 2) restrictions on the movement of people, 3) barriers to competition and public ownership, 4) regulatory transparency and administrative requirements,⁶ and 5) other discriminatory measures and international standards.

In its latest survey (OECD, 2018) trade barriers in telecommunications services for wired and wireless activities have been investigated for 45 countries (36 OECD countries plus nine large countries). Despite WTO commitments having been made by all OECD countries to liberalise trade in telecommunications services substantial trade barriers in the telecommunications sector have been identified (see graph below). In two policy areas, “restrictions on foreign entry” and “barriers to competition”, trade barriers are considered to be very high in several countries:

- As to restrictions on foreign entry trade barriers are manifold: foreign equity limits (six countries), limitations on foreign branches (eight), at least half of the board members to be nationals or residents (ten), foreign investors must demonstrate net

economic benefits to the host country (twelve), and limitations on cross-border mergers and acquisitions (six).

- Also with respect to pro-competitive regulations deficits remain: the national regulatory authority is not independent from the government (15 countries), government ownership still exists (19 countries) and incumbents can hoard valuable spectrum licences (14 countries). In some countries foreign suppliers do not benefit from the regulated termination rates for fixed line services (four) and/or for mobile services (nine).



Source: OECD, 2018

Moreover, in all countries “restrictions on the movement of people providing services on a temporary basis” exist. Most countries have preferential measures for local suppliers or limit non-discriminatory access to public procurement (23 countries) and sometimes national treatment is not fully granted regarding taxes or subsidies (three). Last, also with respect to regulatory transparency deficiencies have been identified for many of the countries. A summary of restrictions for the five policy areas can be seen in the graph above.⁷

In the OECD report it has been acknowledged in the survey that some progress has been made by OECD countries as to the removal of trade barriers. Mexico is given as an example having eliminated foreign equity restrictions and introduced a pro-competitive regulatory regime. Also Israel has adopted pro-competitive regulatory rules for the telecom sector.

To conclude, the WTO has so far not overcome the shortcomings of the Fourth Protocol. As has been shown above, many countries continue to restrict trade in telecommunications services. This is for two reasons: 1) Most members have listed a variety of exemptions from applying WTO rules, and 2) national regulations (not violating the rather vague regulatory rules of the Reference Paper) with the effect of being trade barrier are still in place. The next section will therefore examine whether the CETA agreement on telecommunications services reflects “best practice” in telecoms regulation and makes the market access commitments in this sector more effective on an international scale. If yes, it may be considered as a blueprint for a future revision of the WTO accord on basic telecommunications.

IV. The CETA agreement on telecommunications services

On 30 October 2016, the European Union (EU) and Canada signed the Comprehensive Economic and Trade Agreement (CETA). The agreement, which entered into force provisionally in September 2017, aims at creating one of the largest free trade areas in the world by obliging EU countries and Canada to further liberalize their markets.

Similar to the WTO accord, CETA provides for a chapter (9) with rules on important trade principles (market access, national treatment, m.f.n.) to be applied to (nearly) all services. In addition, the EU and Canada have established specific regulatory rules for the telecommunications sector (Chapter 15). They lay out key principles for the design of national regulatory provisions. Subsequently it will be analysed whether the rules

1. General trade principles for service markets

Chapter 9 on “Cross-border Trade in Services” refers to two modes of providing services: (i) from the territory of one party into that of the other; and (ii) in the territory of one party to the consumers of the other party (Article 9-1: Definitions). The supply of a service in the territory of a Party by a person of the other Party (which is subject to rules laid down in Chapter 10) is not included.

With respect to trade principles being applied to services the following rules apply:

- Article 9.3 on National Treatment stipulates that “Each Party shall accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to its own service suppliers and services”.
- According to Article 9.5 on “M.F.N. Treatment” each Party shall “accord to service suppliers and services of the other Party treatment no less favourable than that it accords, in like situations, to service suppliers and services of a third country.”
- Article 9.6 on “Market Access” prohibits the imposition of quantitative restrictions on the number of service suppliers, the value of services or output.

Similar to the GATS agreement, these commitments on national treatment, M.F.N. and market access do not apply comprehensively. Article 9.7 allows the EU and Canada to list reservations in two Annexes. In Annex I the parties can list the reservations on existing measures that do not conform to the obligations imposed. In critical and sensitive areas, CETA safeguards the ability of the two signatories to introduce discriminatory measures or quantitative restrictions in the future. To do so they must specify these areas or sectors in the reservations of Annex II. Yet in two respects, CETA is an improvement vis-à-vis the GATS accord:

- 1) It is the first trade agreement where the EU has agreed to what is known as a negative list approach, meaning that all services sectors are subject to CETA obligations unless explicitly listed as reservations in the Annexes. The requirement to list of all reservations in Annex I and Annex II provides unprecedented transparency on existing measures. It also means that all service markets are liberalised except those explicitly excluded. In other words, the liberalization would become the new obligation under CETA.
- 2) A ratchet provision ensures that any future regulatory or legal changes which makes it easier for service suppliers from one Party to access the other Party's market will automatically be locked-in under CETA and therefore cannot subsequently be made more restrictive. Should a country decide to liberalise the market for a particular telecommunications service in the future it is obliged to maintain that level of market liberalisation and cannot reverse it (even if a reservation is included in Annex I for the service).

The EU list of reservations in Annex I does not contain any exception for telecommunications services, which are thus subject to full application of CETA provisions. Canada in contrast, has set out reservations related to market access and national treatment in its Schedule to Annex I: It can continue to limit foreign ownership of facilities-based telecommunications service suppliers based on existing laws:

1. Foreign investment in facilities-based telecommunications service suppliers is restricted to a maximum, cumulative total of 46.7 per cent voting interest, based on 20 per cent direct investment and 33.3 per cent indirect investment.
2. Facilities-based telecommunications service suppliers must be controlled by Canadians.
3. At least 80 per cent of the members of the board of directors of facilities-based telecommunications service suppliers must be Canadians.

Severe market access barriers for foreign investment will therefore continue to exist on the Canadian telecommunications market. Yet, also one positive aspect of Annex I reservation needs to be acknowledged: Canada guarantees service providers from the EU

the benefit of the current market access in the telecommunications sector without risk of future restrictions different or additional to those listed. Telecom firms of the EU will benefit should measures be relaxed or eliminated (also vis-à-vis other trading partners) in the future and they will receive automatically the same treatment.

2. Regulatory Rules for Telecommunications Markets

The following key principles for the design of national regulatory provisions are to be found in Chapter 15 of the CETA agreement:

- a) access to and use of public telecommunications transport networks or services,
- b) competitive safeguards on major suppliers,
- c) access to essential facilities and interconnection,
- d) authorisation to supply telecommunications services,
- e) scarce resources,
- f) number portability,
- g) universal services,
- h) regulatory authority,
- i) resolution of telecommunication disputes, and
- j) transparency.

a) Access to and use of public telecommunications transport networks or services

Article 15.3, paragraph 2 of CETA requires the parties to ensure that operators grant each other access to and use of any public telecommunications transport network or service offered within or across its borders. Access covers the purchase or lease of circuits, the connection of private leased or owned circuits and the performing of switching, signaling, and processing functions.

Moreover, no conditions shall be imposed on access to and use of public telecommunications transport networks or services (Paragraph 5). This applies with one exception: Conditions can be imposed to safeguard the public service responsibilities of service suppliers or to protect the technical integrity of networks or services: According to paragraph 4 each Party shall take appropriate measures to protect (a) the security and confidentiality of public telecommunications transport services; and (b) the privacy of users of public telecommunications transport services. Yet, “any such measure shall not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.” Paragraph 6 refers to the conditions as such, which may be imposed: (a) restrictions on resale or shared use of these services; (b) a requirement to use specified technical interfaces; (c) requirements, where necessary, for the inter-operability of these services; (d) type approval of equipment that interfaces with

the network; (e) restrictions on connection of private leased or owned circuits; and (f) notification, registration and licensing.

b) Competitive safeguards on major suppliers

The national telecommunications markets of the EU and Canada continue to be characterised by dominant operators with market power.⁸ They are therefore able to misuse their market power against other competitors. To prevent anti-competitive behaviour the CETA text has an Article 15.4 on competitive safeguards. The provisions commit the parties to provide effective safeguards against unfair competition. The text stipulates that the Parties shall “maintain appropriate measures for the purpose of preventing suppliers that are a major supplier from engaging in or continuing anticompetitive practices”. Examples of anti-competitive practices are (a) engaging in anti-competitive cross-subsidisation; (b) using information obtained from competitors with anti-competitive results; and (c) not making available to other service suppliers, on a timely basis, technical information about essential facilities and commercially relevant information, which are necessary for them to supply services.

c) Access to essential facilities and Interconnection

On the issue of network access, the CETA text contains several provisions: Article 15.6 specifies that major suppliers are required to provide interconnection under non-discriminatory terms and conditions, at cost-oriented rates that regard economic feasibility, sufficiently unbundled, at any technically feasible point and in a timely fashion. Furthermore, they are obliged to disclose information on technical standards and to guarantee a quality that they provide for their own services. Also, procedures for interconnection negotiations have to be transparent and major suppliers shall make publicly available either their interconnection agreements or their reference interconnection offers.

Paragraph 1.f of Article 15.6 stipulates that major suppliers shall ensure interconnection “... at points in addition to the network termination points offered to the majority of users”. Such a provision has a pro-competitive effect because it limits the scope of incumbents as to which network components have to be sufficiently unbundled. Major suppliers have more bargaining power than potential newcomers. Without such a rule they are able to enforce inefficient terms for the provision of interconnection to rivals.

d) Authorisation to supply telecommunications services

The CETA text (article 15.7.) is rather short on this issue. The only passage is that “Each Party should ensure that the authorisation to supply telecommunications services, wherever possible, is based upon a simple notification procedure.”

e) Scarce resources

As to the allocation and use of scarce resources (frequencies, numbers, rights of way) the CETA text (Art. 15.9) requires the parties to carry out the procedures in an open (only EU), objective, timely, transparent and nondiscriminatory manner. This formulation is very similar to the one used in the “WTO agreement on basic telecommunications services” to which Canada and the EU are signatories.

f) Number portability

On number portability the CETA text (Article 15.10) states that “Each Party shall ensure that suppliers of public telecommunications transport services in its territory provide number portability on reasonable terms and conditions.”

g) Universal service

In chapter 15.8. the CETA text defines rules with respect to universal services. The text explicitly recognizes the right of each party to “define the kind of universal service obligations it wishes to maintain”. Moreover, “any measure on universal service” must be “... administered in a transparent, objective, non-discriminatory and competitively neutral manner”. All suppliers should be eligible to compete for the provision of universal services and the selection of a provider must be made “through an efficient, transparent and non-discriminatory mechanism”. In view of ensuring competitive markets, Article 15.2 implicitly foresees the option to compensate the supplier(s) of Universal Services as long as the universal service obligation is not “...more burdensome than necessary for the kind of universal service that the Party has defined.”

h) Regulatory authority

In order to ensure the independence of regulators regulatory authorities shall be legally distinct and functionally independent from any supplier of telecommunications networks, services or equipment, including if a Party retains ownership or control of a supplier of telecommunications transport networks or services (Article 15.11 of CETA text). Moreover, Paragraph 2 stipulates that “Each Party shall ensure that its regulatory authority’s decisions and procedures are impartial with respect to all market participants and are administered in a transparent and timely manner.”

As to the empowerment of the regulator, paragraph 3 of the CETA text requires the regulatory authority to be sufficiently empowered to regulate the sector, including by ensuring that it has the power to “(a) require suppliers of telecommunications transport networks or services to submit any needed information, and (b) enforce its decisions ... through appropriate sanctions that may include financial penalties, corrective orders or the suspension or revocation of licences”.

i) Resolution of telecommunication disputes

On the resolution of disputes (Art. 15.12) each Party shall ensure that firms (including foreign suppliers of telecommunications networks or services) have timely recourse to the regulatory authority to resolve disputes with suppliers of public telecommunications transport networks or services. As appropriate, the regulatory authority shall issue a binding decision to resolve the dispute within a reasonable period of time. The decision of the regulator must be made available to the public.

With respect to appeals and reviews of regulatory authority decisions “Each Party shall ensure that an enterprise whose interests are adversely affected by a determination or decision of a regulatory authority may obtain review of the determination or decision by an impartial and independent ... authority, as provided in the law of the Party. The judicial or administrative authority shall provide the enterprise with written reasons supporting its determination or decision. Each Party shall ensure that these decisions, subject to appeal or further review, are implemented by the regulatory authority.

j) Transparency

Article 15.14. on “Transparency” requires each Party to make publicly available (a) the responsibilities of a regulatory authority in an easily accessible and clear form and (b) its measures relating to public telecommunications transport networks or services. Such measures include regulations, tariffs and other terms and conditions of services, specifications of technical interfaces, conditions for network access, authorisations or licensing requirements, and information on bodies responsible for standards-related measures.

V. Assessment of the CETA accord

In this section the regulatory provisions of the CETA telecommunications chapter are analysed in view of their effectiveness with respect to trade facilitation. In doing so they are compared with the regulatory principles of the WTO Reference Paper.

a) Network access rules and competitive safeguards

The rules on access to and use of public telecommunications transport networks or services ensure in principle that new market entrants can purchase, lease or connect to facilities required for the provision of telecom services. They are much more detailed than those rules established under the WTO accord. Yet, these provisions permit several exemptions having the effect of restricting trade. By allowing conditions to be attached to the use of public networks the parties are still able to create substantial barriers to market entry in the telecommunication sector. For example, by inducing foreign suppliers

to adopt particular sets of technical specifications (i.e. for reasons of technical integrity), the domestic operator would impose higher costs on its rivals.

On network access one major issue, namely interconnection pricing, is not sufficiently addressed in the agreement, a deficiency that has already been identified in the WTO accord (Fredebeul-Krein and Freytag, 1997). The text does not specify the criteria to be used for calculating interconnection charges, which is why cost-oriented rates may become difficult to ensure in practice. Depending on the method for allocating the costs of interconnection, prices might be above the economic costs of interconnection. New foreign (and domestic) entrants would then be discriminated. To prevent this, more specific pricing (and costing) guidelines for access to monopolistic bottlenecks areas such as the local network are necessary in a trade agreement.

Also the rules on competitive safeguards may not effectively provide safeguards against unfair competition. One deficiency is the definition of a major supplier. Article 15.1 defines a major supplier as “a supplier which has the ability to materially affect the terms of participation, having regard to price and supply in the relevant market for public telecommunications transport networks or services...”. Given that the underlying definition is not explicitly limited to a “domestic” supplier, governments are in principle able to impede market entry by foreign operators being a major supplier in their home country. For instance, a country could deny market entry by foreign (major) suppliers of public telecommunications services based on competition grounds. Such competitive safeguard measures would have a strong protectionist drift endangering the market access commitments of the parties. Successful lobbying of domestic firms often drives such action and induces governments to pass corresponding legislation. Last, Article 15 on competitive safeguards does not contain specific rules providing clarity as to how to avoid anticompetitive practices. This would have required listing those conditions to be met for equal treatment: the availability, provisioning, quality and rates of telecommunications services as well as the availability of technical interfaces necessary for interconnection. In the absence of such detailed provisions it cannot be ruled out that governments implement insufficient regulatory provisions on competition safeguards with the effect of impeding foreign market entry.

b) Rules on Authorisation, Universal Service and Scarce Resources

As to authorisations, from a free trade perspective a simple notification procedure is the best option for a licensing regime. While – different from the WTO accord - CETA foresees this form of authorisation, the pitfall in the formulation of the text is that the provision is not mandatory. The wording “should” – and not “shall” - clearly indicates that – from a legal perspective - the signatories are not required to have a simple notification procedure in place. The parties therefore can also opt for a licensing

requirement, thereby impeding market entry of new (foreign) suppliers. Moreover, the text does not contain a limitation of conditions under which a license may be required (i.e. only for the right of use for radio frequencies and numbers), should a country opt for a licensing of new entrants.⁹

Given that the two parties can impose licensing conditions in principle, the absence of any specifications on the terms and conditions for telecommunications licenses opens the door for a variety of options to impede market entry. In order to make it more difficult for governments to discriminate against foreign (and domestic) competitors, the CETA text should have specified licensing criteria, limits on the period of time to reach a decision on an application and the terms and conditions of licenses to be made publicly available. If a license is denied, the applicant must be given the right to request the reasons for denial. Such provisions would have guaranteed the transparency of licensing procedures. Furthermore, to avoid that a country discriminates against foreign suppliers by delaying a decision on issuing licenses, parties should have included a formulation in the text, stating that, on request, an applicant receives the reasons for the imposition of supplier-specific conditions on a license. Last, CETA contains no formulation, stating that “any administrative costs (and no other costs) need to be imposed on suppliers in an objective, transparent, proportionate, and cost-minimizing manner.” Such a provision would have been an effective way to set an upper limit for license fees. It is pro-competitive in the sense that it avoids fees far above costs, which would in that case discourage market entry.

Regarding scarce resources, the CETA text does not go beyond the text of the WTO accord. From a free trade perspective, the absence of rules on procedures of allocating scarce resources is a major shortcoming because the text does not contain any provision encouraging an open spectrum allocation policy. Neither shall the parties endeavor to promote competition when making a spectrum allocation for commercial services nor shall they endeavor to rely generally on market-based approaches in assigning spectrum for terrestrial commercial telecommunications services. The provisions rather indicate that it was the intention of the signatories to retain the right to establish a protectionist regime on the allocation and use of scarce resources.¹⁰ The text explicitly recognizes the right of each Party “... to establish and apply its spectrum and frequency management policies that may limit the number of suppliers of public telecommunications transport services.” Moreover, neither are parties required to identify in advance radio spectrum being allocated for specific government uses, nor are they required to allow for secondary spectrum trading. They only need to make the current state of allocated frequency bands publicly available. Thus, the provisions on scarce resources do not prevent the parties from deterring market entry should they intend to do so.

The text on Universal Services suggests that both the EU and Canada fully retain the right to establish a Universal Service policy according to their national preferences.¹¹ The wording “define the kind of universal service obligations it wishes to maintain” is quite clear on this. Universal service provisions will not be regarded per se as anti-competitive. Compared with the WTO text according to which WTO members are required specify universal service obligation in a “transparent, non-discriminatory and competitively neutral manner”, the provision that “universal service obligations may not be more burdensome than necessary” is preferable with respect to promoting competitive markets. For example, an overcompensation for the provision of universal services, possible under WTO rules, would not be in line with the CETA text.

Critics of CETA argue that the wording suggests universal service obligations could become subject to a demanding necessity test in the event of a dispute, which could severely restrict the scope for regulation. However, such an interpretation of the text is not legitimate. The requirement that obligations are not “more burdensome than necessary” refers to rules on “how to achieve a given universal service goal” and not on “which type of service can be classified as a universal service”. From a competition perspective, one can rather argue that it cannot be fully ruled out that governments adopt a universal service policy that in practice does discriminate against foreign (and domestic) market entrants. This is because the agreement fails to specify 1) how to determine a universal service provider, 2) clear principles for calculating the costs of USP, and 3) procedures by which such costs can actually be measured.

The provisions on authorisation and scarce resources as well as the rules on universal services indicate that the signatories of CETA keep their discretionary power in view of pursuing public policy goals other than economic ones. The provisions reflect the intention of the signatories of CETA to place a strong emphasis on high standards of consumer protection and on the right to regulate in the public interests within their territories. In return, this has the negative effect that a party has several means to impede market entry of new (foreign) suppliers, should it wish to do so. Measures limiting the number of authorisations granted are explicitly allowed for and on spectrum policy, each party retains the right not to provide detailed identification of frequencies allocated or assigned for specific government uses. Also on universal services, each party retains the right to define the kind of universal service obligations it wishes to maintain.

c) Transparency/Procedural Rules

Different from the WTO agreement on telecommunications services, there are several provisions in the CETA agreement that refer to procedures of taking regulatory decisions: The role of national regulatory bodies, transparency rules, consultation rights of third parties (business and consumers) and dispute settlement procedures. For example, as to

the role of the regulator, the CETA text contains clear and effective rules in view of ensuring the independence and empowerment of the regulatory body. This is certainly a progress vis-à-vis the text of the reference paper under the Fourth Protocol.

Other principles for procedural rules are less ambitious. For instance, while the provisions on transparency of legislation certainly support the establishment of a transparent regulatory regime in view of competitive and open telecom markets, much of it is already international standard.¹² What is missing in the transparency article are provisions on when a regulatory body seeks input for a regulatory proposal. More ambitious would have been rules on information and consultation rights during legislative procedures: Consultation mechanisms for discussing new regulatory issues, information to be provided to the interested parties with regard to planned regulation and mechanisms for stakeholder involvement. Advocates of rules on the notification of measures claim that they help to eliminate regulatory uncertainty and improve rule making by governments (Lester and Barbee, 2013).

Another shortcoming is that there is no text passage in the CETA agreement according to which regulatory authorities are required to regularly review all regulations affecting the supply of telecommunications services. Regulators also do not need to determine after such review whether any such regulation is no longer necessary (due to competition) and repeal or modify any such regulation, where appropriate. Last, also appeal and review procedures remain rather vague. For instance, a sharper formulation on this issue would have been to require the regulatory authority to issue a binding decision to resolve the dispute in the shortest possible timeframe.

To sum up, the CETA rules on regulating national telecom markets are more explicit than the provisions of the Reference Paper under the Fourth Protocol of the WTO accord. This is positive in the sense that it encourages open market access and non-discrimination. Yet, the CETA agreement also preserves regulatory space for governments to adopt policies they deem conducive to the protection of the public interest. The pitfall of such provisions is that they can be misused to constitute a hidden form of protectionism.

VI. Conclusion

The international trade rules in telecommunications services, which were established under the WTO accord in 1997, covered principles to ensure competitive market access and non-discriminatory national treatment as well as provisions for the regulation of national telecommunications markets. These WTO commitments were an important first step into the direction of ensuring open and competitive telecom markets. Empirical evidence confirms the positive effect on higher penetration rates and declining prices for

telecom services on a global scale. Yet, it has also been demonstrated that trade restrictions continue to exist, even among WTO members which have signed the WTO Agreement on Basic Telecommunications. The need to revise the WTO rules in view of achieving more effective market access is therefore evident. Unfortunately, no attempt to reform the WTO accord on telecommunications services has been successful so far.

In 2017, 20 years later, for the first time a (bilateral) trade agreement entered into force that goes far beyond what has been achieved under the WTO agreement. On many issues relevant for trade facilitation the rules laid down in the agreement go beyond multilateral commitments. For instance, the negative list approach to services and the ratchet mechanism are trade principles, which cannot be found in the WTO accord. Also, the bilateral CETA agreement between the EU and Canada contains commitments on both sides with regard to discriminatory measures and quantitative restrictions in the telecommunications sector. Last, the regulatory rules established under the CETA agreement are much more detailed than those of the Reference Paper of the Fourth Protocol and do as such constitute substantial progress. CETA reflects a very extensive and comprehensive set of rules with respect to domestic regulation (such as access and interconnection) ensuring market access, fairness, equal treatment with domestic suppliers and transparency for licensing regimes.

Yet, both the principles on trade liberalisation and the regulatory principles still leave space for the EU and Canada to interpret the rules, thereby enabling them to impede market access for foreign competitors should one party intend to do so. For instance, in areas such as authorisation and use of scarce resources, a lack of clear rules as to the terms and conditions of regulatory provisions have the potential to be abused by governments in the future. One reason is that policy goals in the telecommunications sector are not only economic ones. Other policy objectives such as on national security, public interest and regional coherence are very prominent on telecom markets. It is for this reason that national governments tend to keep some discretionary power to intervene on telecom markets, may it also have the negative side effect of being protectionist.

At the outset the question was raised whether the CETA agreement on telecommunication has the potential to become a major step in the direction of further liberalising national telecommunication markets on a global scale. The answer on this is that the CETA agreement has indeed some model character for future multilateral trade negotiations. As has been demonstrated above, the rules on the regulation of national telecom markets are much more specific than the rules laid down in the WTO accord. The regulatory rules agreed could evolve over time into multilateral regulatory standards. The new rules once established offer a unique chance to give new momentum to the adoption of more pro-competitive international rules for the regulation of national telecom markets. This in

return would reduce the risk of other countries resorting to unilateral and purely national solutions. The agreement between the EU and Canada can contribute to such an objective. The cross-border provision of telecom services would be significantly facilitated on a global scale if similar rules were adopted as part of a WTO accord. The principles of most favoured nation treatment, transparency, market access and national treatment as well as the regulatory principles in the Telecom chapter of CETA do therefore have the potential to result in more effective international safeguards for market access commitments.

¹ Other modes of supply cover 1) cross border trade (i.e. international calls), 2) consumption abroad (i.e. international roaming), and movement of people (telecom experts providing services abroad).

² These costs result from network charges, which have to be paid to the network operator.

³ Before the WTO accord it was common practice that countries gave preferred access to some foreign companies but denied equal treatment to other foreign firms. Tyler, M, 1996.

⁴ WTO *op cit* Ref 36, 39, 341-342

⁵ For a detailed list of all current telecommunications commitments and exemptions see https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm

⁶ Measures concerning regulatory transparency cover publication and communication of regulatory and licensing regimes, interconnection agreements and spectrum information.

⁷ For more information about existing restrictions in the telecommunication sector of OECD countries see the OECD website at <http://oe.cd/stri>

⁸ For the European Union see: European Commission, 2019.

⁹ One of those cases is mentioned in Article 15.3, § 6, according to which a licensing condition can be imposed on “access to and use of public telecommunications transport networks or services”.

¹⁰ For instance, many countries do not apply a “use it or lose it” policy to spectrum bands – an important measure that prevents incumbents from hoarding valuable spectrum licences. See OECD, 2019.

¹¹ Both the EU and Canada have established a Universal service policy in view of ensuring that all people have access to communications services. In Canada for example, CRTC has established a universal service objective requiring “Canadians, in urban areas as well as in rural and remote areas, to have access to voice services and broadband Internet access services, on both fixed and mobile wireless networks”. In the European Union, current legislation on Universal Services is less ambitious. Member States are only required to ensure the provision of “Basic communication services such as making a phone call from a fixed location at an affordable price or receiving national and international calls over a fixed connection”. See: CRTC, 2017; and European Commission, 2018.

¹² For instance, GATS article III requires the publication of all relevant laws and regulations. The annex on telecommunications further specifies this obligation: All information on regulatory bodies, tariffs, access and other forms of recognition of foreign service suppliers need to be published.

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