N.B.: The text is very technical and covers topics that neither EDRi or Access cover. This includes spectrum, market access (competition law) and roaming.

There are lots of positive elements, unsurprisingly, as it is broadly based on positive liberalisation experience. However, the text is weakened considerably by deregulation always being an almost ideological driver, regardless of whether the non-regulation is likely to generate barriers. The biggest expected value for such an agreement would be in less developed markets, where more thorough regulation is needed and where the relationship between the incumbent and regulator is closest and more unequivocal rules are needed.

Article 1: [EU propose: Scope] and Coverage

The scope is extremely broad.

- It would be good to have information on the two words the EU is considering "adopted or maintained". They appear to suggest that all current regulations could be called into question.

- The exception for private networks (1.3, b) is unclear:

> *"Nothing in this annex shall be construed:*
> *(b) to prevent a Party from prohibiting persons operating private networks from using their [**US propose**: private] networks to [**US propose**: supply] [**US oppose**: provide] public telecommunications networks or services to third persons.]"* (emphasis added).

It means that they can *provide public telecommunications networks or services to third persons* but it does not mean the annex will not apply to them when they do so.

- Article 1.3. c): This appears to prohibit "must carry" obligations for public service and similar broadcasters (at the same time as the Commission is saying that such "public service" functions would be protected by its (anti-)net neutrality rules:

> *"Nothing in this Annex shall be construed:*
> *[…]*
> *[AU*/CA/CL/CO/JP/KR/PE/US propose:
> *(c) to require a Party to compel any service supplier exclusively engaged in the broadcast or cable distribution of radio or television programming to make available its broadcast or cable facilities as a public telecommunications network.]"*

Article 2: [EU: Openness of Telecommunication Services Markets]

Point one suggested by Korea and Japan* could undermine the EU data protection framework. Japan considers EU privacy law as a barrier to trade. If EU law requires any data controller or processor to comply with EU law to operate in the EU, Japan could find this requirement to be interpreted as market access limitations for foreign participation in e-commerce. A data protection exception should be included.

* The proposal reads:

> *"Subject to a Party's schedule of specific commitments, [**JP propose**: each] [**KR propose**: a] Party shall not adopt or maintain [**KR propose**: market access or national treatment]*

*limitations on [**JP propose**: full] foreign participation in its electronic commerce and telecommunications services sectors, through establishment or other means."*

One possible reason for the US to oppose the foreign shareholding rules is that the current arrangements allow the US to ask for certain favours, such as routing of data through the US in return for bending of the current rules. This is not to say this *does* happen, but the possibility exists and, after Snowden, it is hard to imagine that it does not.

Article 4: Technological Neutrality [US propose: Flexibility in the Choice of Technology]

- We support Costa Rica's opposition to the last part of paragraph 1 (in yellow), as it adds no worthwhile meaning to the previous words, but would render the application of public policy measures more difficult:

*"1. [**CO/CR/US propose:** No Party may prevent a supplier of [**CR/US propose**: public] telecommunications services [**CO propose**: and electronic services] from choosing the technologies it desires to use to supply its services subject to requirements necessary to satisfy legitimate public policy interests, **[CR oppose:** provided that any measure restricting such choice is not prepared, adopted, or applied in a manner that creates unnecessary obstacles to trade.**]]"***

- "Unnecessary obstacles to trade" is too broad. What are "necessary" obstacles to trade? "Obstacles to trade" should be defined in Article 20 in line with Korea's alternative proposal for Article 4.3.** (subject to improvement), excluding fundamental rights, such as data protection and privacy.

*** "3. For greater certainty, a Party retains the right to define its own legitimate public policy objectives; and whenever such a measure is based on relevant international standards, it shall be rebuttably presumed not to create unnecessary obstacles to trade."*

[EU/IS/LI oppose: Article 6: Regulatory Flexibility [US propose: Approaches to Regulation]

We strongly support the EU opposing this article.

There is a profound problem of approach here. A *laissez-faire* approach can also create barriers, yet there are no criteria proposed for this approach, while regulatory action is always open to challenge.

This article gives a lot of power to telecommunications regulatory bodies. This goes far beyond what NRAs are mandated to do in the European Union. It could potentially allow any national NRA to repeal an EU legislation, even though they have no democratic accountability or responsibility. Therefore, we don't see how this provision can be in line with the EU treaties. See, for instance:

- 6.1. b (or the alternative proposal made by New Zealand, the United States and Canada, which is similar):

*"**[AU/PA/NZ/PE/US propose; CH oppose:** Where a Party has engaged in direct regulation, that Party may forbear, to the extent provided for in its law, from applying a regulation to a service that the Party classifies as a public telecommunications service, if its telecommunications regulatory body determines that: [...]"*

- 6.4: *Review of regulations:*

"Each Party shall require their telecommunications regulatory body to:

> *(a) regularly review all regulations adopted by that Party's telecommunications regulatory body that apply to the operations or activities of any provider of telecommunication service subject to its jurisdiction, to the extent provided for in its law;*
>
> *(b) determine after such review whether any such regulation is no longer necessary as the result of meaningful economic competition between providers of such service; and*
>
> *(c) repeal or modify any such regulation, where appropriate, pursuant to subsection (b).]"*

According to these provisions, the NRAs could recommend a Party to stop applying a regulation. Also, the section "*Review of regulations*" proposes that, as a safeguard, each NRA should police itself, to check its own regulatory decisions. This seems rather ridiculous and, in keeping with the focus on deregulation, it does not cover checking its decisions *not* to intervene.

Article 7: [CA/PA propose: Licensing and Other] Authorizations [JP/CH propose: and Licenses] [PA propose: Procedures]

The EU should formally ask the US whether it will be necessary for a supplier of telecommunications to the public to locally store or otherwise process their data in the US in order to get a license.

This is known to be a non-written criteria in order to get a license in the U.S., which would be contrary to their anti-data localisation policy – to the detriment of the principles of national treatment and non-discrimination.

This question would go in line with the concerns that other Parties have already expressed in the definition of "license" (cf. Article 20).

Article 10: Access to and Use of Public Telecommunications [CH propose: Transport Networks and] Services

In order to implement encryption, countries might have to demonstrate that it is justified. This creates a burden and could undermine the security of users' communications. In addition, Article 20 does not define "messages". See Article 10.4 proposed:

> *"4. Notwithstanding the preceding paragraph, a Party may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services." (page 15)*

The alternative Art. 10.4. proposed (page 17) includes better wording as regards to privacy "and protect the privacy of personal data of end users of public telecommunications networks or services". This safeguard is essential:

> *"Notwithstanding paragraph 3, a Party may take such measures as are necessary to ensure the security and confidentiality of messages, and protect the privacy of personal data of end users of public telecommunications networks or services, provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on trade in services."*

It is not clear what "movement of information" means in the alternative Art. 10.3. The use of the expression “machine-readable” is odd, as it seems to mean something narrower than simply “data” or “electronic data”.

A clear non-discrimination principle and options for imposition of access/interconnection, unbundling and net neutrality would be missing, even if these issues are addressed in Article 12.

How can the Commission negotiate on Art. 10.5 when this aspect is still under discussion under the Telecommunications Single Market Regulation proposal?

> **** "5. Each Party shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:*
>
> (a) *to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally; or*
> *(b) to protect the technical integrity of public telecommunications transport networks or services; or*
> *(c) to ensure that service suppliers of any other Party do not supply services unless permitted pursuant to commitments in the Party's Schedule" (page 16).*

Note that this paragraph suffers other modifications, depending on the Parties that proposed the text.

Article 12: Obligations Relating to Major Suppliers [PA propose:7]

- Why only *"major suppliers"*? In any case, the definition proposed in Article 20 should be improved. It appears to refer to SMP operators in the EU. The deregulatory proposal from the EU/NO shows exactly the underlying problem with this whole proposal – the option not to force open the market is offered, despite the huge threat that this would be a barrier to market access.

- 12.5.e) why only "***majority*** *of users*"? (emphasis added).

- 12.10 TR's proposal to add *"without prejudice to the confidentiality of commercial secrets"* should be opposed by the European Union.

- 12.10 c): Australia and New Zealand's proposal to add "*Services for which such terms and conditions are made publicly available may not include all interconnection related services offered*

by a major supplier, as determined by Party under its laws and regulations.]" should not be supported by the European Union.

There is a standard game where major players play smaller competitors off against each other (and prevent them from cooperating) whereby they are all told "confidentially" that they have the best deal. Confidentiality weakens competition.

-12.13 (unbundling of Network Elements): Colombia and Japan's proposal to "seek and consider the views of interested persons" should be opposed by the European Union:

> *"[**CO/JP propose; IL/KR/CH/TR oppose; MX considering:** Each Party, through its regulators, shall ensure that major suppliers in its territory provide public telecommunications service suppliers with access to network elements on an unbundled basis on terms and conditions, and at cost-oriented rates, that are reasonable **[MX propose:** competitive**]**, non-discriminatory and transparent. Each Party shall ensure, through its regulators, to seek and consider the views of interested persons before deciding which network elements shall be unbundled.]".*

The text in yellow – again, an example of the deregulation philosophy of the text – would mean in practice in an uncompetitive market – that the incumbent would be well placed to argue effectively against unbundling.

Article 17 – International Standards and Organisations

International technical standardisation bodies like the W3C or, the IETF should be strengthened and opened more meaningfully to civil society. We therefore suggest these two international bodies to be added at the end of the Article.

Article 18 – International Cooperation

International cooperation is not bad *per se*, as long as it does not have chilling effects on the legislation of a Party (in this case the EU). The wording proposed in 18.b would have this undesired effect:

> *"(b) [**CO/JP/CH propose:** Parties will [**CO propose**: to the extent possible] exchange information in the area of **[CO/JP/MX oppose:** electronic commerce and**]** telecommunications Services. That may include information on, inter alia:"*

This makes the scope of the provision too broad.

> *"(i) technological developments and research in the area of **[CO/JP/MX oppose:** electronic commerce and] telecommunications services;*
>
> *(ii) commercial and technical aspects of the supply of **[CO/JP/MX oppose:** electronic commerce and] telecommunications Services through all modes of supply;*
>
> *(iii) available possibilities for the exchange of **[CO/JP/MX oppose:** electronic commerce and] telecom-related technology; and*

(iv) applicable laws and regulations, legislative processes and recent legislative developments; applicable technical standards.]"

Cooperation at early stages of the legislation would have the potential to undermine EU autonomy of the legislators, the right to regulate and create chilling effects – to the detriment of democracy and transparency. Would these exchanges be made in a transparent way, including the recipients of the (non-exhaustive list of) "information"?
This provision needs to be tied down. This is a red line announced by the EP rapporteur on 13 January 2015: http://www.europarl.europa.eu/ep-live/en/other-events/video?event=20150113-1400-SPECIAL-UNKN.

Article 20 – Definitions

- **Electronic service**: the definition is not clear and is too broad. How is it distinguished from "specialised services" or "other services"?

- **License**: restrictions to conditions imposed by Parties when establishing licenses requirements should be included in this definition. See our comments to Article 7.

- **Non-discriminatory**: the non-discriminatory wording used in this chapter is drafted in terms of Trade law, i.e. the "most favoured nation" principle. This principle is important in trade law and well established in International law. However, when regulating provisions related to internet access, the principle of non-discrimination acquires a different meaning (i.e. net neutrality), which should be specified in each Article (e.g. when referring to the non-discriminatory requirements of terms and conditions).

According to the EP's First Reading text on the Telecommunications Single Market Regulation, this would mean that "all internet traffic is treated equally, without discrimination, restriction or interference, independently of its sender, recipient, type, content, device, service or application".

- Why do they use "**personal information**" in the definition, when in the text (Article 10.4) they refer to "personal data"?

In the current EU legislation (Directive 95/46/EC), Article 2(a) defines personal data as follows: "(a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;"

Why is the European Union negotiating on data protection since it is excluded from the negotiating mandate?
In any case, the EU should push for the complete inclusion of a self-standing clause providing for an exception for the fundamental right to privacy and data protection, not just Article XIV of the GATS.

- The definition of **public telecommunication services** could not be more vague and unclear (see marking in yellow):

*"[CA/CO/JP/PA/TR/US propose: **public telecommunications service [CR propose:** or telecommunications services available to the public**]** means any telecommunications*

*service that a Party requires, explicitly or in effect, to be offered to the public generally. Such services may include, inter alia, telephone and data transmission] [**JP propose:** including internet] [**JP/PA/US propose:** typically involving [**CA propose:** the real-time transmission of] customer-supplied information between two or more defined points without any end-to-end change in the form or content of the customer's information] [**CO/PA propose:** , but does not include information services];"*

If a public telecommunications service is not offered to the public, then to whom?

- The definition of "**user**" proposed is rather narrow. "User" does not need a definition.