ETNO – GSMA joint response to the European Commission's Digital Levy public consultation

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About ETNO

ETNO has been the voice of Europe's telecommunication network operators since 1992 and has become the principal policy group for European electronic communications network operators. Its 40 members and observers from Europe and beyond are the backbone of Europe's digital progress. They are the main drivers of broadband and are committed to its continual growth in Europe.

ETNO members are pan-European operators that also hold new entrant positions outside their national markets. ETNO brings together the main investors in innovative and high-quality e-communications platforms and services, representing 70.5% of total sector investment.

About the GSMA

The GSMA represents the interests of mobile operators worldwide, uniting more than 750 operators and nearly 400 companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sectors. The GSMA also produces industry-leading Mobile World Congress "MWC" events held annually in Barcelona, Los Angeles and Shanghai, as well as the Mobile 360 Series of regional conferences. With over 5 billion mobile connections, GSMA operators are committed to supporting digital and financial inclusion globally.

The telecommunications industry

Telecommunications network operators make significant long-term investments in substantial physical and tangible local infrastructure of the countries in which they operate. This highly intensive capitalised investment makes communications cheaper, faster, and more powerful over time thereby creating the critical infrastructure within each market jurisdiction. The networks and associated operational activities form the backbone which enables the widely recognised digital transformation benefits, provide critical services that improve lives by creating an inclusive digital society.

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Opening remarks

ETNO and the GSMA welcome the possibility to provide their comments below in response to the European Commission's ('EC') Digital Levy public consultation.

We agree that the European Union ('EU') needs a modern, stable regulatory and tax framework to appropriately address the developments and challenges of the digital economy. We therefore consider it appropriate for the digital economy to be taxed in a fair and transparent way with profits taxed where value is created.

ETNO and the GSMA have been positively engaged in the OECD debate on the taxation of the digital economy, and have contributed to the ongoing work at the G20 and OECD level to find a global solution that can support a reform of the international corporate tax framework and the challenges related to the digitalisation of the economy. We believe that the EU should continue to work with the OECD and focus on achieving multilateral consensus and a meaningful long-term and coordinated international solution as soon as possible, which would give businesses increased certainty and reduce complexity on a global basis going forward.

It is our view that a global agreement at the OECD level would help the EU to modernise the EU tax framework to better address the challenges associated with the digital economy. Should the OECD fail to agree on an international consensus, then working at EU level would ensure better level of harmonisation between Member States. To this end and in view of the acceleration of the digitisation of the economy, the taxation challenges of the new online economy should be incorporated in the existing taxation framework (as opposed to via the introduction of entirely new taxes) and the relevant existing regulations should accordingly be adapted in particular regarding the nexus.

If the EU does pursue the Digital Levy, we strongly recommend that any EU proposals should have a clearly articulated principled approach in a number of areas including scope and any departure from the arm's length principle. Furthermore, a company's appropriate tax liability should be based on the profit generated from the company's business activities, not a company's revenues. We would also encourage the EU to ensure that any unilateral DST measures introduced by EU Member States are repealed in full if an EU Levy is agreed and implemented.

Rationale for excluding the telecommunications industry from the scope of the EU Digital Levy

The following comments focus on illustrating the key characteristics of the telecommunications industry that are relevant to the problems the initiative aims to tackle, i.e. the new initiative is meant to help address the issue of fair taxation related to the digitalisation of the economy (as set out in the EC's Inception Impact Assessment of January 2021). Such taxation is therefore meant to ensure a level playing field between the players of the digital economy - which do not contribute their fair share to the economy - and the other economic sectors, in particular the telecommunications sector, which is already taxed in the territories where they are active. It is the view of GSMA and ETNO that the services and activities provided by regulated telecommunications network operators should not be in scope of any EU Digital Levy proposals for the following reasons:

Regulated telecommunications network operators cannot benefit from "scale without mass"

The telecommunications industry is heavily regulated[1]. Therefore, in order to access the telecommunications market in each local country and undertake their activities, regulated telecommunications network operators are required to make long-term investments within the country that they operate to acquire the appropriate spectrum licenses[2]. These spectrum licenses are typically acquired directly from national governments and are the prices paid to acquire the right to use the specific spectrum bandwidth which is a limited national asset, and are an integral part of the physical infrastructure of the countries in which they operate. By November 2020, EUR21.6 billion had been spent in Europe at auctions in the principal 5G bands (700MHz, 3.4GHz-3.8GHz and mmWave)[3]. The authorisations/licenses which are required for the provisioning of telecommunications services in the jurisdiction where the services are provided will be granted to the local legal entity (or permanent establishment) that will be providing the service in that jurisdiction, and not to any overseas legal entities in the MNE group.

As noted above, telecommunications network operators make long-term investments in substantial physical and tangible local infrastructure of the countries in which they operate. This highly intensive capitalised investment makes communications cheaper, faster, and more powerful over time thereby creating the critical infrastructure within each market jurisdiction. The networks and associated operational activities form the backbone which enables the widely recognised digital transformation benefits, provide critical services that improve lives by creating an inclusive digital society, and ensure that the local operator has a physical and taxable presence within the local country.

Regulated telecommunications network operators do not have the ability of digital businesses "to operate in certain jurisdictions and earn revenues elsewhere"

Regulated telecommunications network operators do not operate without local physical presence. As illustrated above, a telecommunications business requires not only the physical infrastructure and network investment but also to be locally regulated, to own its spectrum licenses in a local legal entity, and to monetise that locally. The consumer relationship is therefore not one of remote engagement.

The revenues earned by the telecommunications network operators are generated, monetised and subject to tax (both VAT and profit taxes) within that same market jurisdiction (i.e. domestic operators are typically

[1] Telecommunications regulations may vary across countries, but the telecommunications sector is regulated around the world at both national and international level. Examples of such regulations include the European Electronic Communications Code "EECC" (Directive 2018/1972), its predecessor Directives 2002/19, 2002/20, 2002/21 and 2002/22 as modified in 2009, and all such local or similar laws implementing such regulations including but not limited to the general authorisation regime as set out in Article 12 of EECC. The remit of regulators is extensive, covers wholesale charges between operators, spectrum allocation, obligations in relation to consumer rights, and sector specific taxes such as rights-of-way taxes, regulatory taxes, usage rights taxes (spectrum and numbering) between others.

[2] Spectrum relates to the radio frequencies allocated to the mobile industry and other sectors for communication over the airwaves. Spectrum is a sovereign asset. That is, use of the airwaves in each country is overseen by the government or the designated national regulatory authority, which manages it and issues the needed licenses. Typically, governments use an auction system to sell the rights (licenses) to transmit signals over specific bands of the electromagnetic spectrum and to assign the scarce spectrum resources for finite periods.

[3] ETNO's The State of Digital Communications 2021 https://etno.eu/downloads/reports/the%20state%20of%20digital%20communications%202021.pdf

required to book revenues in the local market jurisdiction in which they operate). Local operators only service consumers from the local market jurisdiction where the local operators are based and do not solicit customers outside of the countries in which they operate. It follows that telecommunications network operators are not reliant on remote sales, and profits (or losses) arising from local trading activities will be retained in the local market jurisdiction where the consumer is based[4].

Roaming Revenues
International roaming is defined as the ability for a customer to make and receive voice calls, send and receive data, or access other mobile services when travelling outside the geographical coverage area of its home network by means of using the infrastructure of a "visited" network. Roaming is therefore an ability for customers to access mobile data and voice services when the customer is outside the coverage area of its home network.

When travelling abroad, the customer (individual or enterprise) is identified in another country by a "visited network", i.e. the network of an operator who has signed a roaming agreement and opened a route with the customer's "home operator". The calls received by this customer when roaming are conveyed and terminated by the visited network. The data usage is also conveyed by the visited network. The home operator remunerates the visited network for the voice minutes, texts and data services used based on a tariff defined in an arm's length bilateral contract between both operators.

The customer always remains connected to his home network operator. The home operator manages the end to end customer relationships and informs the customer when he arrives on the visited network (with a "welcome SMS"). The home network provides information about consumption and bill control, is in charge of all the customer care and customer relation during the trip, invoices the customer and pays the visited network operator. Therefore, the customer has no commercial relation with the visited network. In addition, the home operator monitors the choice of the visited network, when several agreements have been signed in the visited country.

The retail roaming revenue, when applicable, is fully booked by the home operator. Local tax therefore fully applies in the home country. There is no disconnection between the jurisdiction where the service is provided (in the country of origin) and the jurisdiction where the service is billed and taxed.

The types of services and activities undertaken by regulated telecommunications network operators are not relevant to "digital businesses"

The EC has identified that digital businesses are, "able to generate large revenues by making particular use of and by monetising consumer and user data and user-created content". The EC further notes that, "much of this value created by users is not captured by the current tax systems" and, "the place of value creation might not be aligned with the place of taxation."[5]

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[4] The entities in the local market jurisdictions typically operate as local entrepreneurs with a local legal entity (or permanent establishment), with support from other group entities for economies-of-scale/specialisation efficiencies and consistency. Moreover, telecommunications network operators do not typically operate marketing and distribution-based tax structures.
[5] European Commission Inception Impact Assessment January 2021

Regulated telecommunications operators are authorised to operate and provide public telecommunications networks and services in accordance with WTO guidance.[6] The core services provided by such network operators notably include:

- Telecommunications services consisting wholly or mainly in the conveyance of signals, including the transmission of video, audio and data signals, to and for the use of consumers and enterprises.
- Roaming services, provided by mobile operators (as the "Home Operator") to their customers visiting another country (the visited country) , in order to enable such customers to still use the Home Operator mobile telecommunication services, on the basis of an arm's length wholesale agreement entered into by the Home Operator and its roaming partner operating in the visited country.
- Locally authorised, licensed or regulated TV services transmitted or broadcasted via domestic cable, broadband and radio waves provided by domestic network infrastructure operators.

As noted above, in order to provide these services, regulated telecommunications network operators invest in and operate large networks of domestic or international cable (including but not limited to copper, submarine, fiber optic and dark fiber), passive telecommunications infrastructure (e.g. masts, towers, shelters, cabinets, trenches, cable ducts, and similar, either proprietary, leased or made available on the basis of right-of-use agreements), and active telecommunications infrastructure. They therefore have a sustained physical presence or infrastructure in the jurisdictions in which they provide these services.

We also wish to highlight that the OECD has concluded in the latest Pillar One Blueprint[7] that services providing access to the Internet or to an electronic network would not be recognised as 'Automated Digital Services' on the basis that the provision of such services typically requires a degree of local infrastructure and is subject to local telecommunication regulations. In addition, the OECD is currently undertaking further work to consider a complete exclusion from Amount A of Pillar One for the operation of certain sectors related to the operation of infrastructure (which is provided as a service to consumers), and specifically the core activities of regulated telecommunications network operators on the basis that the policy challenges of the digitalised economy do not present themselves in the telecommunications industry.

We are of the view that the same position should be adopted for any EU Digital Levy proposal on the basis that the activities of regulated telecommunications network operators are very different to those identified by the EC, the value created is captured by current tax systems, and the place of value creation is aligned with the place of taxation.

[6] https://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm

[7] OECD Tax Challenges Arising from Digitalisation – Report on the Pillar One Blueprint (October 2020)

Regulated telecommunications network operators already pay significant taxes in the jurisdictions where they create value

Companies in the telecommunications industry are typically not high margin businesses and do not earn non-routine profits. The heavy sector-specific regulation in each country in which regulated telecommunications network operators are present also often includes price regulation. The impact of this local regulation means that regulated telecommunication network operators' opportunities to earn residual profits are minimised, and even where they can be earned, they arise in the local market jurisdiction itself and are subject to taxation in the local market where the operator has a taxable physical presence.

In addition, roaming activities are increasingly subject to regional regulations. In Europe, since the implementation of the Regulation EU 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation EU 531/2012 on roaming on public mobile communications networks within the Union, EU customers are able to use their mobile retail offer without extra charge, when calling or using data when travelling in another EU country. This severely restricts the ability of network operators to generate significant revenues and profits from roaming services.

Sector Specific Taxes & Fees

In addition to corporate income tax and other general taxes applicable in the local consumer markets where they operate, mobile operators in the EU are subject to a wide range of unilateral taxes, regulatory fees and contributions. These telecommunications-specific taxes ('TSTs') contribute significantly to the tax burden paid by telecoms operators.

A recent survey by the GSMA of mobile operators in 86 countries worldwide found that on average operators paid 22% of their revenues in taxes, of which a third was due to TSTs.[8] In Europe, several countries apply telecom-specific levies, including Greece, Italy, Albania, Hungary, Ukraine, Portugal and Malta.
In addition to general taxes and TSTs, one-off spectrum fees, can amount to hundreds of millions of dollars per year for operators across the world. Mobile operators pay governments in order to obtain radio spectrum used to carry communications wirelessly, being a critical input in the provision of mobile connectivity. When awarding spectrum for mobile services, governments generally take into account efficiency considerations as well as consumer welfare considerations. However, governments often view spectrum assignments as a way to raise public revenues, leading to excessive spectrum pricing.

Overall, these sector-specific taxes and fees are very prevalent and substantial and have been in existence for several years. Importantly, telecommunications operators do not obtain double taxation relief under double taxation agreements. Further details have been included in Appendix 1.

[8] https://www.gsma.com/publicpolicy/resources/rethinking-mobile-taxation-to-improve-connectivity

Any additional EU Digital Levy would create a strong likelihood that regulated telecommunications network operators would suffer double taxation in Member State jurisdictions

If the EU does determine that a Digital Levy is necessary, and the activities of regulated telecommunications network operators are in scope, we consider that the EU must commit to prevent any double taxation on regulated telecommunications network operators, and there needs to be clear principles and guidance for the elimination of double taxation. Specifically:

- There should be clear mechanisms to ensure that any EU Digital Levy paid should be creditable against domestic taxes levied on company profits in order to avoid any additional fiscal burden or double taxation on telecom activities.
- Any unilateral DST measures introduced by EU Member States are repealed in full if an EU Digital Levy is agreed and implemented.
- EU Member States agree to repeal any TSTs once the EU Digital Levy is effective, or any TSTs paid by operators must be fully creditable against any EU Digital Levy payable.
- The EU Digital Levy should not seek to additionally tax profits that are subject to tax under any future global solution agreed at the OECD level.

The above would ensure that an EU Digital Levy would not discriminate against regulated telecommunications operators. We would also encourage clear and prior-agreed upon dispute resolution processes that are easily accessible for taxpayers.

Risk of Increased Administrative & Compliance Burden

To ensure that the administrative and compliance burden is minimised, we strongly recommend that:

- There is only one filing and payment obligation for MNE groups, in the parent company's jurisdiction.
- Only the tax jurisdiction of the parent company has a right to audit.
- Harmonization procedures are implemented (i.e. payment currency, language, data required in reports).

Conclusion

GSMA, ETNO and their members remain committed to providing input and expertise on the telecommunications industry in order to provide support in achieving a sustainable and fair solution to appropriately address the developments and challenges of the digital economy. Whilst it is our view that only in the absence of a global solution agreed at OECD level should the EU consider an EU Digital Levy, we recommend that:

- The EU ensure a principled approach, and any EU Digital Levy is based on profits generated and not a company's revenues.
- The services and activities provided by regulated telecommunications network operators should not be in scope of any EU Digital Levy proposals as they cannot benefit from scale without mass, do not operate in certain jurisdictions and earn revenues elsewhere, the types of services and activities provided are very different to those that are relevant to 'digital businesses', they are unable to provide services at low marginal costs, and already pay significant taxes in the

jurisdictions where they create value.

- The EU must commit to prevent any double taxation, and there needs to be clear principles and guidance for the elimination of double taxation.
- The administrative and compliance burden is minimized.

Appendix One – Sector Specific Taxes & Fees

Telecommunications-specific taxes

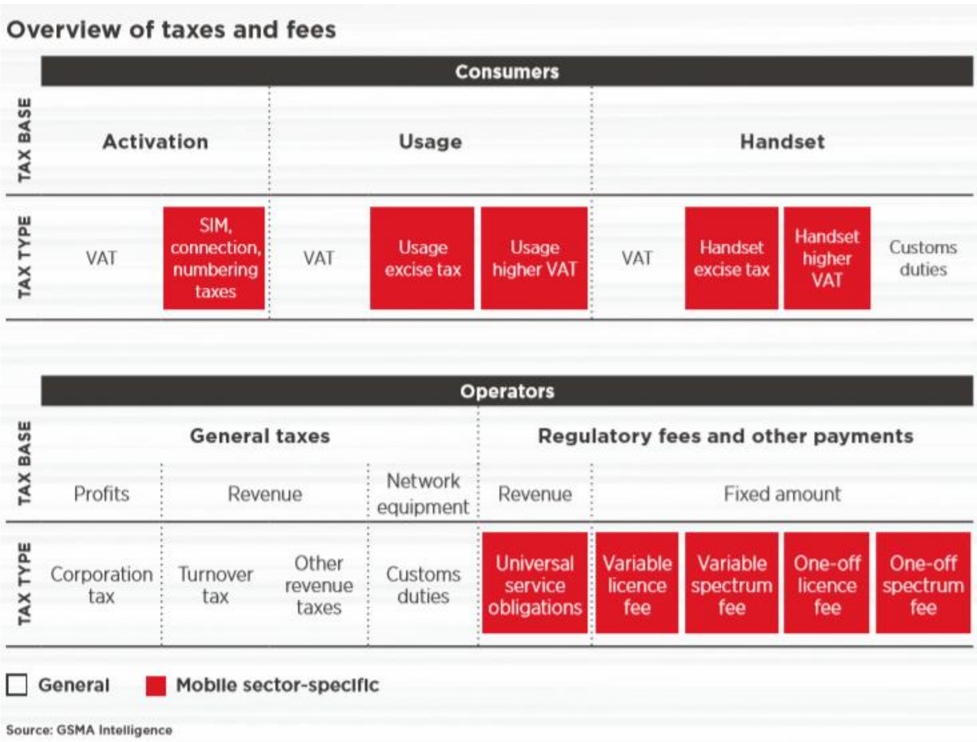
Mobile operators pay a high percentage of their revenues in taxes, and the tax burden is significantly increased by the incidence of TSTs in some cases. In Europe, the GSMA estimated that taxes represent 21% of operators' revenues, of which 4% are TSTs.[9]

The countries and size of TSTs have also been increasing over time. The GSMA estimates that the number of countries where consumers pay sector-specific levies almost doubled between 2011 and 2017, while there have been around 120 sector-specific tax-rate rises or new levies introduced during this period.

The significant burden from TSTs is borne partly by consumers, reducing affordability of telecoms services and mobile connectivity with detriment to its proven socio-economic benefits such as digital and financial inclusion. It also hinders investment in connectivity infrastructure, as operators' cash flows are reduced, and the volatility of tax changes creates more tax uncertainty.

The types of TSTs levied around the world are varied and complex. Many of these taxes are applied as ad-valorem or fixed charges on the prices paid by consumers when buying a mobile device, on activation of their mobile services and on the usage of mobile services such as voice and data. Operators also face additional taxes on revenue or profits in some countries. Many operators also contribute to universal service funds from their gross revenues, via annual taxes or fees.

An illustration of the types of TSTs applied on the mobile sector is given in the table below.

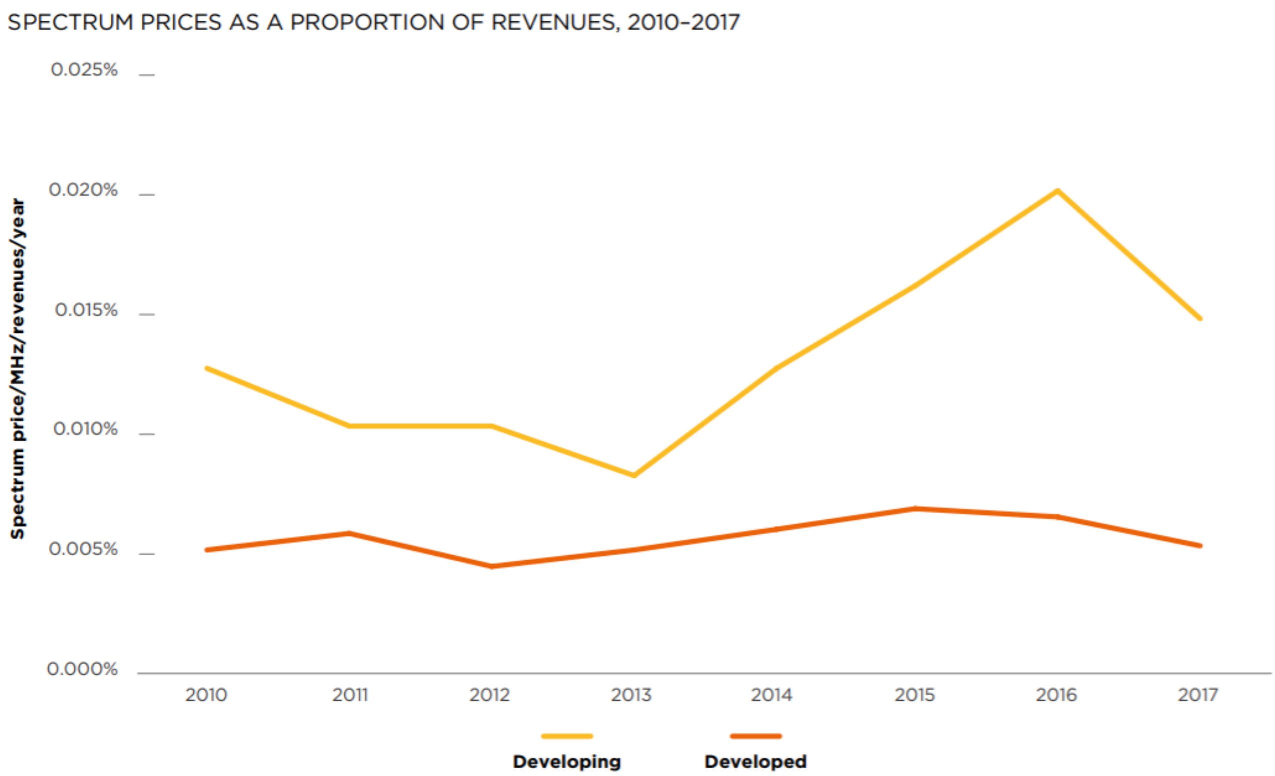


[9] https://www.gsma.com/publicpolicy/resources/rethinking-mobile-taxation-to-improve-connectivity

Telecommunications Spectrum Fees

Spectrum costs can represent a significant proportion of mobile revenues, as shown in the figure below for developed and developing countries.[10]

In Europe, mobile operators spent EUR 21.6 billion in 2020 at auctions in the principal 5G bands (700MHz, 3.4GHz-3.8GHz and mmWave)[11].



[10] https://www.gsma.com/spectrum/resources/effective-spectrum-pricing/
[11] ETNO's The State of Digital Communications 2021 https://etno.eu/downloads/reports/the%20state%20of%20digital%20communications%202021.pdf