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## Is Skype a telecommunications company - and why does it matter?

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Telecommunications constitute the core of the digital economy. EU regulation of the sector aims at promoting connectivity and access to very high capacity networks. To that end, and to keep up with technical developments, the regulatory framework is revised from time to time with a view to roll back regulation as competitive markets take hold. Whether or not an activity falls under the regulatory framework for telecommunications, which is the main category under electronic communications services, makes a huge difference as the recent ECJ decision on Skype illustrates.

### Introduction

On 5 June 2019, the European Court of Justice (ECJ) made a preliminary ruling affirming that SkypeOut is a telecommunication (telecoms for short hereafter) service.<sup>1</sup> The case was brought to court in Belgium in 2011 after Skype declined to file notifications with the telecoms regulator on the ground that it is not a telecoms operator

(hereafter telco for short). French authorities have also demanded Skype to register as a telco, which the company has resisted. To the general public it may sound weird to take the sector classification of a company to court – isn't classification just for statistical purposes?

The issue here is that the European Digital Single Market comprises two categories of services: "electronic communications services" and "information society services", which are subject to quite different regulations. Computer-to-computer voice and video services are classified as information society services, which is lightly regulated compared to electronic communications services including telecoms. The definition and classification of telecoms are contentious issues also in the multilateral trading system and in trade negotiations.

<sup>1</sup> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=214741&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1>

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## What difference does it make to be a telco in the EU?

Information society services are subject to regulation on technical standards and the general regulatory framework facing all firms, for instance the General Data Protection Regulation (GDPR). On the other hand, electronic communications services are subject to a set of specific regulations. This is because electronic networks and services are essential for the digital economy to function. Firms that control such assets may not always act in the best interest of the common good. In order to make sure that seamless communication across networks is possible and companies have incentives to invest in very high capacity networks and services, telcos are subject to specific regulations. Furthermore, those that are deemed by the national regulator to have significant market power (SMP) must offer competitors interconnection and access to their networks at non-discriminatory conditions. To enforce such regulation, the regulator imposes a package of specific obligations on each SMP.

SkypeOut is not considered an SMP and would not face such firm-specific obligations. Nevertheless, there are also general regulations that all electronic communications services providers face. The first, which triggered the dispute in the first place, is an obligation to notify the regulator about planned activities before starting to offer the service. Telcos must also provide information to the regulator in a timely manner and at the level of detail requested by the regulator. Furthermore, a telco

may have obligations related to universal services.

## How does classification matter in trade agreements?

The World Trade Organisation (WTO) General Agreement on Trade in Services (GATS) constitutes the multilateral legal framework for trade in services. Its architecture is based on general horizontal obligations to treat all WTO members equally, and on countries' specific obligations to liberalise sectors of their choice. The sector-specific commitments are made through so-called "schedules". These are lists that each country submits, containing sectors or sub-sectors that the country in question has committed to liberalise or to keep open if already liberalised. The schedule has a status of international treaty. The GATS uses a so-called "positive list" approach, which means that specific obligations to liberalise only apply to the scheduled sectors. Furthermore, countries may include reservations on the scheduled sectors - for instance, some activities might be subject to restrictions. With this architecture, it is of utmost importance to be clear about which economic activities are included in the schedule of commitments.

The schedules are anchored to a sector classification developed by the WTO Secretariat to help bring clarity. The classification is from 1991 and is called W120. This was before the internet came into popular and commercial use and even mobile telephony was still in its infancy. The W120 for telecoms thus looks like a

museum piece, including telex services, telegraph services and facsimile services.

Since products rather than sectors are traded, the W120 offers a concordance to the UN's Central Product Classification (CPC). While the CPC has been revised from time to time, last time in 2015, the W120 has not been changed since it was created. According to rulings by the WTO Dispute Settlement Body, the commitments are defined jointly by the W120 and the CPC.<sup>2</sup> This is, however, easier said than done in telecoms, where the gap between the W120 and the CPC has widened with every update of the latter. For instance, some services that are classified as telecoms in the W120 are classified under computer services or other communication services in the revised CPC.

Countries that have fully opened computer services, which include computer-to-computer voice and video calls, but have taken reservations for telecoms, could impose new regulatory obligations and trade barriers to SkypeOut-like services with the stroke of a pen, in case the ECJ decision sticks and takes precedence also outside the EU. Conversely, countries that have taken reservations for telecoms but not for computer services may face requests to fully liberalise SkypeOut-like services, as well as data processing services classified as telecoms under the W120.

<sup>2</sup> See for instance the panel report on the US-Mexico dispute on measures affecting telecommunications services (WT/DS204/R) of April 2004.

## What trade restrictions do telcos face that computer services escape?

The Organisation for Economic Co-operation and Development (OECD) has developed a database that records applied trade-related restrictions and regulations in 45 countries including all OECD members and major emerging economies.

[Table 1](#) below lists some key applied restrictions faced by telcos that do not affect computer services.

**Table 1: Number of countries with restrictions, selected measures, by sector 2018**<sup>3</sup>

	Telecoms	Computer services
Foreign equity caps	6	0
The majority of directors must be national	4	0
The majority of directors must be residents	6	4
Commercial presence is required	18	6
Joint venture requirements	1	0
Investment screening	18	13

Source: [OECD STRI database](#)

The business model of SkypeOut and similar services relies on seamless communications across borders. Should these services fall under

<sup>3</sup> The table refers to applied regulation as instituted in national laws and regulations. RTA trading partners may be exempted from the regulations. The restrictions do not apply to intra-EU transactions.

telecoms schedules, they could face a requirement to establish a commercial presence in order to offer their services to local customers in 18 out of 45 countries, 12 of which do not have the same obligation for computer services providers.

If commercial presence involves establishing a subsidiary, additional restrictions kick in. Six countries (Canada, China, Indonesia, Israel, Korea and Malaysia) have foreign ownership restrictions in place for telecoms. China also requires joint ventures; Canada, India, Israel and Japan require that the majority of board members in telcos are nationals; and five countries have more stringent investment screening in place for telecoms than for computer services.

## Conclusion

When sectors are subject to different sets of regulations and trade restrictions, classification makes a huge difference to a company.

The issue of classification is highly relevant for telecoms, a sector where technology is changing fast with the introduction of new products and the obsolescence of existing services at frequent intervals. Basing trade agreements on a sector classification like the W120 is therefore not future proof. A better approach is to define telecoms by function, such as *the transmission and reception of signals by any electromagnetic means*, as modern trade agreements do, like for example the EU agreement with Canada (CETA). However, even with a functional definition, there are still border cases as the ECJ decision on SkypeOut illustrates.

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## References

Hildegunn Kyvik Nordås (2019), *Trade in telecommunications and international trade agreements*, Working Paper no. 2019-01, Trade and Investment in Services Associates (TIISA).



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