

December 2004

ETNO Reflection Document in response to DG External Relations' Consultation "Strengthening the EU-US Economic Partnership"

Executive Summary:

ETNO welcomes the European Commission's consultation on EU-US Economic Partnership. Today, not trade but foreign direct investments are the driver of the transatlantic economy. In light of this ETNO raises the attention to crucial investment barriers that European telecommunications companies continue to encounter when trying to acquire assets in the US market.

- Section 310 of the 1934 Communications Act establishes restrictions to direct and indirect foreign investment in US companies holding a broadcast or common carrier radio license.

- Exon Florio law of 1998 requires that any "merger, acquisition or takeover" of a US "business" be approved by the Committee on Foreign Investment in the United States (CFIUS). It has to determine whether the foreign interest exercising control may take action to threaten national security. The discretion is largely unchecked and there is no judicial review of decisions.

ETNO fears that the current climate may encourage wide interpretation of the scope of Exon Florio, allowing censoring a wide variety of business combinations under the guise of national security.

ETNO very much welcomes the European Commission's initiative to launch the present consultation on EU-US Economic Partnership.

The European Union and the United States are the two most integrated economies in the world with a transatlantic trade accounting for US \$ 725 billion. However, trade is a misleading indicator to describe the transatlantic economic partnership. Today, not trade but foreign direct investments are the driver of transatlantic economic relations, accounting

for a figure of US \$ 1,8 trillion in 2003. This was stated also repeatedly by various interventions at the Commission's Hearing on 22 October in Brussels and we support this view. US companies in Europe created 4.1 million jobs and likewise European companies employ 4.3 million people in the United States. Adding the jobs that are created also indirectly by EU and US foreign investment plus the impact of trade on the transatlantic labour market, the figures are even much higher and amount to 12 to 14 million employees.

ETNO supports all efforts on both sides of the Atlantic to further mutual market access as well as market integration. We therefore would like to stress the above figures¹ as they indicate the benefit of foreign direct and indirect investment for growth and job creation.

In light of this importance of foreign investment for the transatlantic economy, we consider the present Consultation a good opportunity to raise the attention to crucial investment barriers that European telecommunications companies encounter when trying to acquire assets in the US market.

1. Section 310 of the 1934 Communications Act - Restrictions to Foreign Investment in Common Carrier Radio Licenses

The US made commitments in the framework of the Basic Telecom Agreement to suppress restrictions to indirect investment from 1 January 1998, while foreign direct investment in US companies holding common carrier radio licenses continue to be limited to 20% (indirect investment being allowed up to 100%).

However, Section 310 of the 1934 Communications Act establishes restrictions to direct and indirect foreign investment in US companies holding a broadcast or common carrier radio license. The US Administration holds the view that it is not necessary to adopt specific legislation to abolish such investment restrictions, since the FCC may waive these restrictions under the current law by invoking the "public interest." The US Administration and the FCC consider that this waiver provision is sufficient for the FCC not to apply Section 310(b)(4) of the 1934 Communications Act to WTO Members. This situation, however, does not provide certainty to European operators and ETNO is looking for removal of the restriction.

2. Exon Florio Law – CFIUS Process

The Exon Florio law of 1998 requires that any "merger, acquisition or takeover" of a US "business" be approved by the Committee on Foreign Investment in the United States ("CFIUS"), comprised of 12 agencies. The

¹ Partners in Prosperity, The Changing Landscape of the Transatlantic Economy, by Daniel S. Hamilton and Joseph P Quinlan, 2003

regulations implementing Exon Florio are written very broadly, so as to encompass any number of various business combinations, including joint ventures. The Committee has to determine whether the foreign interest exercising control may take action to threaten national security. This could in the end mean any businesses sector – i.e. not only telecommunications, but for instance pharmacy, energy, software etc. In the wake of the 11th of September 2004 the concerns behind the law have been amplified considerably. The discretion of the US Government agencies in CFIUS is largely unchecked and there is no judicial review of decisions.

Particularly, in the fall of 2003, Global Crossing and Singapore Technologies Telemedia signed a deal with CFIUS that set a new precedent. The agreement was far-reaching, and establishes a very high standard for future foreign investments in the United States.

Because of the significant resources required and the strict minimum requirements for any purchasing entity, it will be necessary for businesses to take the CFIUS clearance process and minimum requirements into account when deciding whether to pursue an acquisition in the first place. The process can no longer be considered a simple clearance that one assumes will be obtained. This causes insecurity for foreign investors.

Based on the Global Crossing precedent, strict minimum requirements for any future acquisition will include extensive oversight by the US Government of key operations of the purchasing entity; strict visitation and communications policies for foreign nationals; stringent corporate governance requirements (such as the appointment of Security Directors and a Security Committee); appointment of a third party auditor; and increased screening of sensitive personnel (such as citizenship and security clearances for key persons).

Increased costs and restrictions will chill foreign investment, limit the number of potential bidders to a deal, and increase the ultimate price of the deal. Given the costs and restrictions, other foreign companies will be less likely to entertain potential deals. Moreover, the increased costs and restrictions will discourage US companies from seeking foreign partners. The costs of the process and resulting restrictions will impact both the foreign purchaser and the US purchase. Ultimately, a smaller field of bidders will result in skewed and higher transaction prices.

ETNO fears that the current climate may encourage wide interpretation of the scope of Exon Florio, allowing to censor a wide variety of business combinations under the guise of national security. As noted above, the regulations implementing Exon Florio are written very broadly, so as to encompass any number of various business combinations, including joint ventures and there is no judicial oversight.