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COMMUNICATION FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

Work Programme on Electronic Commerce

Scope and Classification Issues

The following communication has been received from the delegation of the European Communities and their Member States with the request that it be circulated to the Members of the Council for Trade in Services.

The WTO programme on electronic commerce adopted by the WTO General Council on 24 September 1998 envisaged discussions on a series of services issues within the context of the Council for Trade in Services. One of the first items that should be clarified in this context is precisely the coverage of the General Agreement for Trade in Services in relation to electronic commerce. This relates not only to what is covered by the general principles of the GATS, but also, what specific commitments apply to electronic services transmissions.

1. In principle, there are **three different kinds of transmissions involved in electronic commerce**:

- (i) electronic transmissions in certain cases consist solely of telecommunications. They transport sound, data or images which do not constitute in themselves any other services activity. In that case, the electronic transmission does not serve to carry any other content service or transaction. This happens, for example, when the internet is used for providing internet phone, electronic mail or transfers of data-bases;
- (ii) electronic transmissions are increasingly used for ordering goods over the internet which are subsequently delivered physically (e.g. flowers or groceries); and
- (iii) last, the whole transaction can be done in an electronic form. Services (content) can be both ordered and/or delivered in electronic format, although this means of trade has not yet become widely available for all services sectors. Examples are legal advice requested and provided in electronic form; films ordered and distributed on demand via the internet; or banking services on-line.

All these different kinds of electronic transmissions involve services which fall within the scope of the General Agreement for Trade in Services. In addition, the service consisting of 'access to the networks' (i.e. access to the internet) falls itself under the coverage of the GATS. This paper focuses on how the GATS relates to each of those types of electronic commerce.

2. **Access to the network** is needed for *any* electronic commerce transactions (whether ordering goods or purchasing services). Access to the internet is also needed for 'navigating' on the net, - i.e. gathering information, even if no product is bought; for having access to electronic advertising; or for engaging into any other internet facilities (internet phone, data base retrieval or e-mail). 'Internet' is an open network, nobody run by quasi-regulatory private organisations. Therefore, it could be argued that in the case of the internet there exists no commercial 'internet network operators'. The 'internet access providers' are those services suppliers who provide 'access' to the existing self-running network.

Since access to the internet requires access to and use of public telecommunications transport networks, WTO Members must ensure that providers of other Members are accorded this access and use on reasonable and non-discriminatory terms and conditions, as provided in the GATS Annex on Telecommunications. The position in Members' schedules on services relating to access to the internet is not uniformly clear: some delegations have not made any mention on the ground that telecommunications commitments are technologically neutral, while others have referred to 'integrated telecommunications services' as defined in CPC 75260¹; and a third group have explicitly referred to 'internet services' in their schedules. It is clear that Members intend internet access services to be covered by the GATS, including the GATS Annex on telecommunications.

3. The Internet can be used to transport sound, data or images (i.e. telecommunications services) which do not consist of any separate services activity. Thus, for example, telecom services such as phone, e-mail and data-based retrieval services can be done over internet. In these cases, there would be two services components in the electronic transmissions: the service consisting of access to the internet (see above under 2) and the other telecommunications services which are provided over the internet network. During the GATS Negotiations on Basic Telecommunications services it was decided that "unless otherwise noted in the sector column, any basic telecom service listed in the sector column may be provided through any means of technology *e.g.* cable (*including, for example,* copper, fibre optic and cable television cable) wireless, satellites²". Thus **the telecommunications subsectors listed by WTO Members on telecommunications (both basic and value added) would cover also the provision of those services over the internet**. In this sense, for example: electronic mail covers e-mail on the internet and is a specific value added telecoms services (CPC number 7523); on-line information and data-base retrieval on the internet is also a specific value-added telecoms service which would cover data storage such as internet host services (CPC number 75232); voice on the internet falls under "public telephone services" (CPC 7521).

4. **Goods can be ordered on the internet and delivered physically.** Typical examples nowadays are flowers, books, food or drinks. Despite in principle this may seem trade in goods (and therefore outside the scope of the GATS) it is worth noting that there are three services elements in these transmissions that will fall under the GATS: the internet access services (see above under 2); a telecoms service (see above under 3) and the distribution service consisting in selling merchandise to retailers (wholesale) or selling merchandise for personal or household consumption (retail). The distribution element of this electronic transmission would be covered by the commitments in WTO Members' schedules on 'distribution' (CPC numbers 611, 612, 621, 622, 631 and 632).

5. Last, the **content can be delivered electronically**. In this case, internet is used to order and deliver services on-line. Thus, for example, bank and stock exchange services are accessible on the internet; universities degrees and masters' courses can be provided at distance on the net; consulting, legal or health advice can be given directly on-line; advertising services, publishing and motion picture distribution can be provided directly to the final user on the internet.

¹ "Private point-to-point or multipoint network services which enable the users to simultaneously or alternatively transmit voice, data and/or image".

² Note by the Chairman, 26 November 1996 (S/GBT/W/2).

The GATS Annex on Telecommunications establishes clearly that each Member shall ensure that service suppliers of any other Member are accorded access to and use of *public telecom transport network* and services on reasonable and non-discriminatory terms and conditions "for the supply of a service included in its Schedule". Thus, the Telecoms Annex guarantees that whenever a WTO Member has specific market access and national treatment commitments for a particular service sector/sub-sector, the commitments apply also to those services sectors/subsectors when delivered in electronic form. This is regardless of whether the WTO Member in question has bound GATS commitments on telecommunications services or not. We share the view that the rules applying to content services should be those relating to the content itself, not those relating to the means of transmission.

Therefore, it can be concluded that the GATS principles apply to the order and delivery of services by electronic means. The market access and national treatment commitments made by WTO Members within their GATS Schedules of Specific Commitments on the various services sectors (e.g. financial, professional, advertising, publishing, audio-visual, health or education) guarantee the market access and national treatment conditions bound by each WTO Member for those services not only when provided in a traditional format but also via electronic means. Unless specifically excluded in Members' schedules, the services sectors or subsectors applicable to services provided in a traditional manner are also the relevant ones when the service is provided in an electronic form.

In conclusion, the GATS applies to various elements of electronic commerce transmissions: internet access services (covered by the GATS Annex on Telecommunications and WTO Members commitments on basic telecommunications); telecommunications services (covered by the various telecommunications' services subsectors), distribution services involved in the ordering of physical goods (covered under the distribution services sector); and services ordered and delivered on-line (covered under the different services sectors and/or subsectors applicable to the same services when provided in a traditional manner).

In this respect, we overall support the conclusions of the 16 November WTO Secretariat paper on the Work Programme on Electronic Commerce (S/C/W/68) in relation to "scope" and "classification issues".

This communication is without prejudice to further notes on other aspects of the WTO work programme that the European Communities and their Member States may present in the future.
