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COMMUNICATION FROM THE EUROPEAN COMMUNITIES

Government Procurement in Services

The following communication, dated 13 June 2005, from the delegation of the European Communities is being circulated to the Members of the Working Party on GATS Rules.

1. In its communications on government procurement in services of July 2002, May 2003 and May 2004, the European Communities (hereinafter the EC) submitted proposals for a framework that could be developed under the GATS, including an Annex to the GATS on procedural rules for government procurement and the possibility to make specific commitments in GATS Schedules to open up to international competition government procurement in services. These communications underlined the flexibility of such framework and the benefits that could be drawn from it. The underlying principle would be that each WTO Member would have the possibility to undertake relevant government procurement commitments in the sectors it wishes to open to international competition and according to the specifications it would set in order to fulfil its public investment and development needs.

2. In the EC communication submitted in May 2004 (S/WPGR/W/48), the EC gave in particular elements that could be developed into **scheduling guidelines for government procurement commitments under the GATS**. The WTO Secretariat Note S/WPGR/W/51 on the main approaches to the undertaking of commitments on government procurement in Economic Integration Agreements (EIAs) provides interesting observations that could enable the Working Party on GATS Rules to further work on such scheduling guidelines.

3. The WTO Secretariat Note S/WPGR/W/49, on the government procurement provisions contained in economic integration agreements, provides a good working basis and a useful source of inspiration in regard to **procedural rules** that could be developed for government procurement in the context of the GATS. Singapore, in its Statement of 24 November 2004, underlined that most of the agreements reviewed in that Secretariat Note contain procedural rules typically covering such topics as: non-discrimination, valuation of contracts, technical specifications, procurement methods, qualification of suppliers, procedural rules regarding invitations to participate, time limits for tendering and delivery, tender documentation, and award of contracts. This provides the structure of an annex to the GATS on procedural rules for government procurement and the question now is what types of rules should be developed under the relevant headings.

4. In this context, the EC is hereby putting forward a new contribution that aims at helping defining the appropriate procedural rules to be developed in an Annex to the GATS on government procurement in services. Such rules are particularly important to ensure the effective opening of government procurement markets. They would apply to sectors where Members undertake specific government procurement commitments.

I. PRELIMINARY CONSIDERATIONS

A. SCOPE AND DEFINITIONS

5. The proposed GATS Annex would indicate that it applies to government procurement of services as it is defined in Article XIII:1 of the GATS. This brings into the scope of the Annex any law, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale nor with a view to use in the supply of services for commercial sale.

6. During discussions in the Working Party on GATS Rules, some WTO Members have suggested that the scope of government procurement in services, as opposed to government procurement of goods, should be defined. In its Statement of 24 November 2004, Singapore underlined that a basic question to address was whether a clear distinction could be made between goods and services procurement.

7. The Tokyo Round Agreement on government procurement had to address this question since it was aimed at covering government procurement of goods. Its Article I: 1 (a) provided that: "This Agreement applies to any law, regulation, procedure and practice regarding the procurement of products by the entities subject to this Agreement. This includes services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts *per se*."

8. The GATS Annex on Government Procurement could include a provision precisising that it applies to measures by Members affecting the government procurement of services, defined as covering government procurement contracts in which services are the primary subject.

9. Within the scope of the Annex, the procuring entities could be defined as encompassing all entities listed in Article I: 3 (a) GATS. Nevertheless, the Annex should recognise the right for a WTO Member to limit the scope of its government procurement commitments to a limited group of procuring entities, which could be listed in the Schedule, sector by sector, on the basis of either a positive-list or negative-list approach. For practical purposes, Members might consider listing covered entities in an annex to their Schedule, especially in the case they were to be the same for all committed sectors.

B. THRESHOLDS

10. Threshold values would be indicated in the Members' Schedules. According to studies conducted by the EC in the framework of the integration of the EC procurement market, it appears that below certain thresholds no effective cross-border procurement takes place. The EC is therefore of the opinion that all Members should apply the same level of thresholds, regardless of the size of their procurement market. This would increase the efficiency and transparency of the future GATS Annex on Government Procurement.

C. SPECIAL AND DIFFERENTIAL TREATMENT

11. The positive list structure of the GATS and the flexibility of the proposed approach, notably the possibility to schedule partial commitments including specific limitations, mean that WTO Members would retain full discretion about the timing and coverage of the commitments they would undertake to open their government procurement markets to international competition. Developing countries would therefore be able to open up progressively their government procurement markets in the services sectors they see fit, and to implement measures aimed at the development of certain

services sectors and domestic industry, including the possibility of applying preferential pricing policies.

12. In addition to this “built-in flexibility”, the EC considers that it may be useful to reflect on specific special and differential treatment provisions in the GATS Annex on government procurement. For instance, it is often accepted in government procurement instruments to include provisions in favour of offset regimes aimed to develop industrial sectors or regions.

II. RULES APPLICABLE TO PROCUREMENT PROCEDURES

A. NON-DISCRIMINATION

1. National treatment

13. In its previous communications, the EC proposed that WTO Members could indicate in a fifth column of their GATS Schedules, for each sector and each mode of supply, whether and if so, which specific commitments and limitations they undertake for laws, regulations or requirements governing government procurement in services.

2. MFN treatment

14. The Most-Favoured Nation (MFN) clause of the GATS applies across the board to each services sector, regardless of whether the sector has been subject to specific market access or national treatment commitments. Discussions in the Working Party on GATS Rules have suggested that WTO Members would favour following this principle also as regards government procurement in services.

15. However, there could be a one-off possibility to schedule MFN exemptions at the time of entry into force of the GATS Annex on Government Procurement, to take account of the fact that MFN exemptions relating to government procurement were not scheduled at the time of entry into force of the GATS because Article II GATS was not applying to government procurement. The scheduling of MFN exemptions relating to government procurement could follow the usual structure of the GATS lists of MFN exemptions.

16. Finally, the EC has proposed that the GATS Annex on Government Procurement include an exception to the MFN principle to ensure that the more favourable treatment that GPA parties may accord to each others in the framework of the GPA regime, are not extended on an MFN basis to non GPA parties.

B. VALUATION OF CONTRACTS

17. In order to prevent Members’ procuring entities from splitting or dividing government procurement contracts with the intention of avoiding or circumventing the application of future specific commitments for procurement above certain thresholds, some common rules on the valuation of contracts should be fixed. These valuation rules should furthermore enable Members to identify whether services are the primary subject of a given government procurement contract.

C. TECHNICAL SPECIFICATION AND QUALIFICATION OF SUPPLIERS

18. The provisions of Article VI of the GATS and the disciplines of Article VI:4, once agreed, would apply to government procurement in services. Article VI:4 refers to specific types of domestic regulation, more precisely to licensing requirements and procedures, qualification requirements and procedures, and technical standards.

19. The question may be discussed whether those provisions and disciplines would be sufficient to ensure that domestic regulations relating to technical specification and qualification of suppliers in the case of government procurement are not unduly restrictive. The need to have tenders that reflect the diversity of possible technical solutions (when technical specifications are drawn up in terms of functional performance) or the use of official or permanent lists of qualified suppliers by some WTO Members, would however plead for the development in the GATS Annex on Government Procurement of additional specific provisions on technical specification and qualification of suppliers for government procurement.

D. PROCUREMENT METHODS

20. Three broad categories of procedures are commonly distinguished: public or open tendering procedures, selective or restricted tendering procedures (whereby only those suppliers invited to do so may submit a tender) and limited tendering or direct contracting or single tendering (where the procuring entity contacts directly potential suppliers).

21. The agreements reviewed in the Secretariat Note S/WPGR/W/49 (pp. 23-34) explicitly foresee as a standard procedure the use of open or selective tendering procedures and permit, under certain conditions, the use of limited tendering procedures.

22. Accordingly, the GATS Annex on Government Procurement could indicate that, in general, open or selective procurement should be favoured. Conditions and circumstances justifying the use of limited tendering could also be specified in the GATS Annex on Government Procurement.

23. Effective access to government procurement opportunities is closely linked to competitive and transparent procedural rules. This heading would also cover information on procurement opportunities, tendering, and qualification and contract award procedures. It could include a minimum set of information to be provided in procurement notices, such as title, date and place for submission of tenders, etc.

E. TIME PERIODS

24. The GATS Annex on Government Procurement should fix reasonable time periods that would enable interested suppliers to prepare and submit requests for participation where appropriate and/or to prepare and submit tenders in a responsive manner. In determining time periods, Members could take into account such factors as the distance, the use of electronic means and the complexity of the tender.

F. TENDER DOCUMENTATION

25. The GATS Annex on Government Procurement could provide that the information made available should be sufficiently precise to enable suppliers to assess their interest in a particular government procurement contract and, should they wish to participate in it, to submit tenders. Sufficiently precise tender documentation should attract only the best-qualified service providers and at the same time achieve effective competition. Specific elements of information to be included are the address of the entity where tenders should be sent, the language or languages in which tenders and any other documents may be submitted, the criteria for awarding the contract and the terms of payment.

G. CONTRACT AWARD

26. The GATS Annex on Government Procurement could assert the principle that contracts are awarded either to the lowest tender or to the tender determined to be economically the most advantageous in terms of the specific evaluation criteria set earlier in the procurement notice or tender documentation (for instance quality, price, technical merit, aesthetic and functional characteristics, environmental criteria, which are linked to the subject matter of the contract, etc.).

27. The GATS Annex on Government Procurement could in addition provide that, as regards domestic review of decisions to award a specific contract, and appropriate and prompt information of bidders, provisions of GATS Article VI:2 and VI:3, respectively, should apply.

III. CONCLUSION

28. The EC looks forward to discussing elements presented in this Communication and to elaborating an Annex to the GATS on Government Procurement in Services.
