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**Working Party on GATS Rules**

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## **COMMUNICATION FROM THE EUROPEAN COMMUNITIES**

### Government Procurement in Services

The following communication, dated 6 May 2004, from the delegation of the European Communities is being circulated to the Members of the Working Party on GATS Rules.

1. Within the framework of the negotiations under the mandate given by GATS Article XIII:2, the European Communities (hereinafter the EC) submitted in July 2002 and May 2003 contributions with proposals on a framework that could be developed under the GATS for government procurement in services, and on the benefits that could be drawn from them. The EC is hereby putting forward a new contribution aiming at replying to questions on its two communications mentioned above, which were raised by WTO Members, including by Singapore in its Non-Paper of November 2003, circulated as JOB(03)/216.

2. As requested by several WTO Members in previous meetings of the Working Party on GATS Rules, this contribution includes examples of government procurement commitments and MFN exemptions that could be scheduled by Members. It proposes to define the scope of application of future GATS provisions on government procurement and clarifies the relationship between the proposed GATS framework for government procurement in services and the plurilateral Agreement on Government Procurement (GPA). Finally, it notes the importance attached by several Members to the development of an appropriate set of procedural rules.

## **I. SCHEDULING OF GOVERNMENT PROCUREMENT COMMITMENTS AND OF MFN EXEMPTIONS**

### **A. SPECIFIC GOVERNMENT PROCUREMENT COMMITMENTS**

#### **– Example 1 – no government procurement commitment**

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments	Limitations on government procurement
Advertising (CPC 871)	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section		Unbound

3. This example reflects the current situation, when no commitments have been made for government procurement in services. In such a situation, laws, regulations and requirements governing government procurement in services in this particular sector would only be subject to the GATS provisions, to which they are already subject today, i.e. all GATS provisions other than GATS Articles II, XVI and XVII. This includes notably (but not only) GATS Article III on Transparency covering relevant measures of general application, GATS Article VI on Domestic Regulation (in particular as regards domestic review), GATS Article VII on Recognition, GATS Article XII on Restrictions to safeguard the Balance of Payment, GATS Article XXIII on Dispute Settlement and Enforcement.

– Example 2 – full government procurement commitment above a specific threshold

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments	Limitations on government procurement
CPC 84 – Computer services	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section		None for contracts above 200.000 SDR (Special Drawing Rights)

4. In this situation, a commitment has been made for all government procurement contracts in the CPC 84 sector above the 200.000 SDR (Special Drawing Rights) threshold. This means that all laws, regulations, procedures and practices regarding government procurement in services above this threshold have to be open to services regardless of their country of production and to foreign service providers and to locally-established suppliers with foreign affiliation or ownership on a National Treatment and MFN basis (unless MFN exemptions have been scheduled – see section B hereafter). All entities listed in GATS Article I:3, i.e. central, regional & local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities, are covered by this commitment. WTO Members could schedule thresholds adapted to their economic size and needs, on a sector by sector basis.

– Example 3 – partial government procurement commitment

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments	Limitations on government procurement
Architectural Services (CPC 8671)	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section		None for central procuring entities only, and for contracts above 200.000 SDR. Domestic price preference of 5%.

5. In this situation, only procurement by central governments and authorities is covered. The threshold is 200.000 SDR. In addition, a 5% price preference may be awarded to domestic service providers.

– Example 4 – articulation between government procurement commitment on one side and market access and national treatment commitments on the other side

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments	Limitations on gov. procurement
Construction services (CPC 51)	Modes 1,2) Unbound Mode 3) None Mode 4) Unbound except as indicated in the horizontal section	Modes 1,2) Unbound Mode 3) None, except that the CEO is subject to a residency requirement. Mode 4) Unbound except as indicated in the horizontal section		None for contracts above 5.000.000 SDR.

6. In this situation, procedures to award public contracts above the 5 million SDR threshold in the construction sector have to be open to foreign service providers, on a National Treatment and MFN basis (unless MFN exemptions have been scheduled – see section B hereafter). Central, regional & local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities, are covered by this commitment.

7. However, these commitments for government procurement have to be read in conjunction (i.e. cumulatively) with Members' existing market access and national treatment commitments for the relevant sector (including horizontal commitments – or limitations). This means that a foreign service provider having been awarded a government procurement contract would then have to comply with market access and national treatment conditions applying to foreign service providers. This is a general rule – i.e. the validity of this comment is not limited to this specific example. In the particular case above, it may be obliged to establish a commercial presence and to comply with a residency requirement, as such conditions may be imposed on all foreign construction companies willing to provide services in the territory of the WTO Member under consideration.

8. This means that the GATS commitments for government procurement would not apply to measures affecting trade in services other than measures regarding government procurement: any benefit gained from government procurement commitments under the GATS would be subject to the traditional GATS commitments on market access and national treatment.

– Example 5 – government procurement commitment limited to some modes of supply

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments	Limitations on government procurement
Telecom services	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section	As contained in the attached Reference Paper	Modes 1, 2) Unbound  Modes 3, 4) None for contracts above 200.000 SDR, except that Mode 4 is limited to ICTs.

9. In this situation, government procurement of telecom services may be open only to foreign service providers that have established a commercial presence in the territory of the WTO Member under consideration.

10. The indication of an “Unbound” in modes 1 and 2 in the government procurement column serves precisely to indicate that companies that are not established in the territory of the WTO Member under consideration, may not bid for a government procurement contract in the telecom sector.

11. It may be recalled that in financial services, some WTO Members have already opened, under the Understanding on Commitments on Financial Services, government procurement of financial services to suppliers of other WTO Members established in their territory.

– Example 6 – government procurement of services covering several sectors

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitm.	Limitations on government procurement
CPC84 – Computer services	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section		None for contracts above 200.000 SDR (Special Drawing Rights)
Management Consulting Services & Related (CPC 865 & 866)	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section	Modes 1,2,3) None Mode 4) Unbound except as indicated in the horizontal section		None for contracts above 200.000 SDR (Special Drawing Rights)

12. In this situation of a government procurement contract covering services falling in several CPC categories, e.g. CPC 84 (computer services) and CPC 865 (Management Consulting Services), procedures to award such contract would have to be open to foreign service providers, on a National Treatment and MFN basis (unless MFN exemptions have been scheduled – see section B hereafter), since commitments have been made in all services categories covered by the contract.

13. If GATS government procurement commitments have been made only in one of the two sectors concerned, e.g. CPC 84 but not CPC 865, *and if* the contract cannot be divided into two different contracts – one covering activities falling in CPC 84, which would be covered by GATS commitments in this example, and the other covering activities falling into CPC 865, which would not be covered by GATS commitments in this example –, a specific provision of the GATS Annex on government procurement would define how to determine the “main object of the contract” (determined according to the value of each category of service covered). This provision would be similar to the one dealing with mixed contracts covering the procurement of goods and services (see Part II of this paper). In this example, if the “main object of the contract” appears to be the procurement of computer services, the contract would then be covered by the Member’s GATS government procurement commitments.

## B. MFN EXEMPTIONS

14. The proposed agreement on government procurement in services would provide that the MFN Treatment should apply to the government procurement procedures in sectors opened to international competition.

15. However, at the time when the GATS entered into force, WTO Members had the possibility to list MFN exemptions. GATS Article XIII:1 specifically provided that Article II on MFN does not apply to government procurement, which rendered irrelevant the scheduling of MFN exemptions at that point in time. Since the agreement on procurement that will result from GATS Article XIII:2 negotiations would extend the application of MFN to procurement, consistency would require that this extension should be accompanied by the one-off possibility to schedule MFN exemptions. This possibility would be provided for in a specific article of the GATS Annex on Government Procurement.

16. MFN exemptions could for instance be scheduled by WTO Members to provide more favourable treatment to service providers originating from countries of their region or from developing countries. They would follow the usual structure of GATS MFN exemptions.

– Example – government procurement MFN exemption that could be scheduled

Sector or subsector	Description of measure indicating its inconsistency with the MFN Treatment obligation	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Architectural Services (CPC 8671)	Measures aimed at offering preferential conditions for the provision of architectural by nationals of countries X, Y, Z.	Countries X, Y, Z.	10 years	This measure reflects the wish to foster regional cooperation.

17. These MFN exemptions would not serve to cover the benefits deriving from being a Party to the GPA. The relationship between the GPA and the GATS would be done through the inclusion of specific provisions in the future GATS Annex on Government Procurement (see part III), which would ensure that the GATS does not extend on an MFN-basis to other WTO Members the more favourable treatment that GPA parties may accord to each other in the framework of the GPA regime. This specific provision would cover current GPA Parties, as well as future GPA Parties, who will not need to schedule an MFN exemption for that purpose.

## II. SCOPE OF THE GATS AGREEMENT ON GOVERNMENT PROCUREMENT

18. Several Members underlined the need to define the scope of government procurement provisions under the GATS, since the GATS covers trade in services. The situation is similar to the one prevailing before the entry into force of the WTO Agreement, when the GATT was covering trade in goods and the GATT Code on Government Procurement was applying to the procurement of goods.

19. Article 1-1 (a) of the GATT Code on Government Procurement was providing that it applied to any law, regulation, procedure and practice regarding the procurement of products by the entities subject to the Code, and that this included services incidental to the supply of products if the value of these incidental services did not exceed that of the products themselves, but not service contracts *per se*.

20. An analogous provision could be included in the "Annex to the GATS on Government Procurement of Services".

## III. RELATIONS WITH THE GPA

21. It was underlined in several meetings of the Working Party on GATS Rules that new government procurement rules and obligations under the GATS should not extend on an MFN-basis to other WTO Members the more favourable treatment that GPA parties may accord to each other in the framework of the GPA regime.

22. The EC has proposed that a specific provision would organise appropriate interface between the GPA and the "Annex to the GATS on Government Procurement in Services". This provision would ensure that the GATS agreement on government procurement would not affect GPA rules and obligations, which would continue to apply between existing and future GPA parties. It would also make clear that benefits gained by GPA parties from GPA commitments would not be extended under the GATS on an MFN-basis to other WTO Members.

23. In a specific service sector, a GPA-party may make no government procurement commitment under the GATS, but may have made a commitment under the GPA. In this case, government procurement contracts awarded by the GPA-party under consideration would only have to be opened to GPA-parties, under the conditions set out by the GPA.

24. In another specific service sector, a GPA party may make a limited government procurement commitment under the GATS (limited sectoral coverage, limited coverage of procuring entities – for instance restricted to the central level, + scheduling of price preferences), and a broader commitment under the GPA (broader sectoral coverage, broader coverage of procuring entities and no price preference). A WTO Member that would not be party to the GPA would only be assured of having access to the government procurement contracts awarded by the GPA party under consideration, as limited by the GATS commitments of that GPA party. This is not dissimilar to the situation that prevails today with the coexistence of bilateral and regional government procurement agreements between WTO Members, some of which may be party to the GPA and some of which may not be, e.g. NAFTA.

25. In order to ensure the effective co-existence and coherence of both systems (GPA and future GATS regime), further in-depth consideration should be given on the relative level of government procurement commitments under the GPA and under the GATS.

#### **IV. PROCEDURAL RULES**

26. The importance of developing appropriate procedural rules, in order to ensure that access to procurement opportunities will be effective, has been underlined in previous contributions and in discussions of the Working Party on GATS Rules, with several Members mentioning in particular challenge procedures.

27. The EC underlined that a number of such provisions were already included in the text of the GATS, such as for instance in GATS Article VI on Domestic Regulation, in particular as regards domestic review. More specific rules on the transparency of bidding procedures may have to be developed in the GATS Annex on Government Procurement. The rules contained in the bilateral and regional agreements listed by the WTO Secretariat in S/WPGR/W/44 may be a useful source of inspiration in this regard. The EC would therefore like to invite Members to share the experience they may have got from the bilateral, regional and/or plurilateral agreements they have signed, and to discuss procedural rules that they think have to be implemented to ensure the effective application of future GATS obligations regarding opportunities to bid, national treatment and MFN treatment.

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