

Trade in Services

WORK PROGRAMME ON ELECTRONIC COMMERCE

Progress Report to the General Council

Adopted by the Council for Trade in Services on 19 July 1999

1. The Council for Trade in Services submitted an Interim Report on its discussions under the work programme on electronic commerce (S/C/8) to the General Council on 31 March 1999. The Report identified issues on which discussions had progressed closer towards a common understanding and others requiring substantial further examination. Following the Interim Report, the Council for Trade in Services has continued to discuss the work programme at its meetings of 26 April, 18 May and 22-24 June 1999. At those meetings the discussions focused on the ten issues identified in paragraph 5 of the Interim Report as requiring considerable further examination as well as the twelve issues contained in paragraph 2.1 of the Work Programme adopted by the General Council (WT/L/274). Reports on those meetings are contained in documents S/C/M/35, 36 and 37.

2. Since the Interim Report, a communication on the work programme on electronic commerce by Australia (S/C/W/108) and an informal paper from the European Community (Job No. 3636) have been submitted.

3. This report is structured according to the individual items contained in paragraph 2.1 of the work programme and provides information on progress made on each of the items. Points of common understanding are reflected under each item, as well as issues which require further clarification and issues on which there are different views. It should be noted that it does not constitute a comprehensive record of the issues raised by individual delegations.

Scope of the GATS with respect to the electronic delivery of services

4. It was the general view that the electronic delivery of services falls within the scope of the GATS, since the Agreement applies to all services regardless of the means by which they are delivered, and that electronic delivery can take place under any of the four modes of supply. Measures affecting the electronic delivery of services are measures affecting trade in services in the sense of Article I of the GATS and are therefore covered by GATS obligations. It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied. Some delegations expressed a view that these issues were complex and needed further examination.

5. It was recognized that services could be supplied electronically under any of the four modes of supply. However, there was particular difficulty in making a distinction between supply under modes 1 and 2 in the case of electronic commerce, but no conclusion was reached as to how to clarify the matter, and it was agreed that further work is necessary.

6. Several delegations expressed the view that all products delivered electronically are services and that in the context of the work programme it would be useful to make clear that the GATS applies to all products delivered electronically. Other delegations said that it was not clear to them that all electronically delivered products are services and that if there were some which would not be considered services, rules other than those of the GATS would apply to them. It was suggested that further work on this issue was necessary.

MFN (Article II)

7. It was the general view that all general GATS provisions, including the MFN obligation, are applicable to the supply of services through electronic means.

8. Members noted that the issue of likeness is central to the application of MFN and that the main question to be addressed in this regard is whether electronically delivered services and those delivered by other methods should be considered "like services". Members also noted that the issue of likeness is one of the most complex legal issues, not only in the GATS, but also in the GATT and that there is considerable GATT jurisprudence which establishes that the determination of likeness can only be made on a case-by-case basis. Some Members suggested that within the limits of individual sectors and modes of supply, it should be possible to agree that likeness would not depend on whether a service was delivered electronically or otherwise.

Transparency (Article III)

9. The general understanding was that the obligations of Article III on transparency apply to all laws and regulations affecting the supply of a service through electronic means.

Increasing participation of developing countries (Article IV)

10. The common understanding was that the participation of developing countries in electronic commerce should be enhanced *inter alia* by the implementation of Article IV of the GATS through the liberalization of market access in areas of export interest to them and through better access to technology, including technology relating to encryption and security of transactions and to efficient telecommunication services. In this regard, some Members highlighted the impact on widespread uses in electronic commerce of existing restrictions on export of state-of-the-art encryption technology by some Members. It was also noted by some delegations that prohibitions on the export of encryption technology would be viewed in light of Article XIVbis of the GATS. Reference was also made to the importance of developing human resources and physical infrastructure. Some delegations stressed that it is important to take account of the revenue and other fiscal implications of electronic commerce for developing countries and suggested that advantage should be taken of the work done in UNCTAD and the Committee on Trade and Development in regard to developing country interests in the matter. It was also suggested that efforts to ensure the development of electronic commerce and internet infrastructure should also be addressed in development assistance programmes.

Domestic regulation, standards, and recognition (Articles VI and VII)

11. It was the general view that the provisions concerning domestic regulations in Article VI of the GATS apply to the supply of services through electronic means. It was the general view that in the area of domestic regulation it is crucial to maintain a balance between the right of Members to regulate and the need to ensure that domestic regulatory measures do not constitute unnecessary barriers to trade. Members also recognized the importance of the distinction between the disciplines of Article XIV (General Exceptions) and any possible disciplines to be developed under Article VI:4 of the GATS. Some delegations suggested the development of disciplines under Article VI:4 of the

GATS in relation to electronic commerce. Some delegations said that electronic commerce is an area where rapid economic growth has been fostered by the existence of very little regulation and that the emphasis in the field of domestic regulation should be on keeping regulation to a minimum in order to favour further growth. It was also suggested that consideration should be given to the constraints facing developing countries in fulfilling legitimate regulatory objectives in this field and to dealing effectively with technical barriers to trade encountered by developing countries.

Competition (Articles VIII and IX)

12. The general view was that the expansion of electronic commerce could help reduce the extent of restrictive business practices, *inter alia*, by facilitating market entry for smaller service suppliers.

13. It was noted that monopolies and restrictive business practices might pose obstacles to electronic commerce and that this issue needed further examination. Some Members were of the view that there might be a need to further clarify the applicability of the principles relating to competitive safeguards (including interconnection) and allocation of scarce resources in the telecommunications Reference Paper to major suppliers of telecommunication services in relation to electronic commerce. It was noted that the competition safeguards in the Reference Paper apply to major suppliers of basic telecommunications and that in some countries the Internet access provider is also a major supplier of basic telecommunications. A suggestion was also made that improvement of access to distribution channels and information networks, including the internet, needed further examination.

Protection of privacy and public morals and the prevention of fraud (Article XIV)

14. It was noted that Article XIV of the GATS (General Exceptions) applies, *inter alia*, to the protection of privacy and public morals and the prevention of fraud, and there was agreement that measures taken by Members must not be more trade restrictive than necessary to fulfill such objectives. They also must not constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade in services. It was also noted that, as Article XIV constitutes an exception provision, it should be interpreted narrowly, and its scope cannot be expanded to cover other regulatory objectives than those listed therein.

Market-access commitments on electronic supply of services (Article XVI)

15. Without prejudice to questions concerning likeness of services, it was the general view that the means of delivery does not alter specific commitments; they permit the electronic supply of the scheduled service unless otherwise specified. It was pointed out that it would be possible to define the coverage of a commitment, in the sector/sub-sector column of the schedule, as excluding supply through certain technological means.

16. Some delegations argued that it should not be assumed that a country which has made commitments in basic telecommunications has automatically committed Internet access services, particularly given the fact that some Members had explicitly scheduled these services. Other delegations argued that the issue of commitments on Internet access services and networks needed to be further clarified, in the light of the fact that many delegations regarded their commitments on basic or value-added telecommunications services as covering Internet access.

National treatment (Article XVII)

17. There was a general understanding that national treatment commitments cover the supply of services through electronic means unless otherwise specified.

18. Members expressed the same views on the issue of likeness as for MFN.

Access to and use of public telecommunications transport networks and services (Annex on Telecommunications)

19. The general view was that the Annex on Telecommunications applies to access to and use of the Internet network when it is defined in a Member's regulatory system as a public telecommunications transport service and/or network in terms of that Annex.

20. It was noted that the Annex guarantees access to and use of public telecommunication networks for Internet access providers, but it was not clear whether it also guarantees service suppliers access to and use of Internet networks and services. Since it might be important for service suppliers to have the right of access to Internet networks and services, it was agreed that it would be desirable to further examine this matter.

21. It was noted that a key question in the determination of the applicability of the Telecommunications Annex is whether some Internet related services can be considered "public telecommunications transport networks", as the Internet is a network of networks, which includes public and private networks.

Customs duties

22. Some delegations said that customs duties on electronic transmissions could affect electronic commerce and the electronic supply of services. Other delegations argued that the concept of customs duties is alien to the GATS and would become a relevant issue only if it were accepted that a category of electronically delivered goods exists. Other delegations maintained that customs duties could be applied to services, but saw a need to clarify the implications of applying customs duties to electronic transactions. It appeared from the discussions on this item that Members might wish to address at least the two following questions: (i) how customs duties could apply to services; and (ii) how customs duties could apply to electronic transmissions.

23. Some delegations supported making the current standstill on customs duties permanent and binding. Some said that unless the classification issue was resolved they would not be able to consider extension of the standstill. Others said that they could support a permanent and binding standstill, but without prejudice to their position on the classification issue. Other delegations said that they could only envisage extension of the standstill on the current basis, possibly until the end of the forthcoming negotiations, while some were not convinced of the case for extension. The point was made that a decision to extend the standstill would be a political one, which could only be taken by the General Council, while the debate in the Services Council should focus on the technical and legal issues involved. It was also noted that, when reporting to the Third Ministerial Session, the General Council will review the May 1998 Declaration on Global Electronic Commerce, the extension of which will be decided by consensus, taking into account the progress of the work programme. Some delegations said that the concept of technological neutrality could be undermined by assuming that customs duties could be applied to services electronically transmitted and not to services delivered by other means. Some delegations suggested the need to examine the impact of domestic taxation on electronic commerce. Others said that matters related to domestic taxation were outside the ambit of the work programme and should not be discussed.

Classification issues

24. Delegations endorsed the view that all services, whether supplied electronically or otherwise, are covered by the GATS, and that the GATS makes no distinction between services provided electronically or by any other means. It was also observed that the vast majority of all products delivered electronically are services.

25. Some delegations were of the view that all electronic deliveries are services and could not see any non-services products, which could be delivered electronically. Other delegations suggested that it still remained to be clarified whether there were a number of electronically delivered products which should be classified as goods and therefore subject to the GATT rather than the GATS. The question was also raised as to whether such products, even if classified as services, should be subject to full MFN and national treatment obligations and to general prohibition of quantitative restrictions. It was also suggested that there might be categories other than goods and services for classifying certain electronically delivered products; in some cases a downloaded product might be regarded as neither a good nor a service. However, it was pointed out that no suggestion was made to the effect that there was any product that would fall outside the scope of WTO agreements. It was agreed that further consideration, including the consideration of concrete examples, should be given to this question.

26. In discussion of the issue of possible new services, it was the general view that electronic delivery had given rise to very few new services, if any, but that further work is needed to identify any such services and decide how they should be classified. Some delegations argued that the identification of new services should be done keeping in mind the existing classification structure based on the Services Sectoral Classification List (MTN.GNS/W/120) and the UN CPC.
