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**Working Group on Transparency
in Government Procurement**

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ELEMENTS FOR AN AGREEMENT ON TRANSPARENCY IN GOVERNMENT PROCUREMENT

Communication from the European Communities

The following communication, dated 4 November 1999, has been received from the Permanent Delegation of the European Commission with the request that it be circulated to Members.

The European Communities submitted a non-paper for an agreement on transparency in government procurement to the Working Group on Transparency in Government Procurement on 28 July 1999 (Job No. 4519). During the last few weeks, intensive discussions have taken place inside and outside the Working Group to arrive at more consolidated text elements.

The European Communities would like to emphasize their full commitment to reach a multilateral agreement on transparency in government procurement. In order to further the current process aiming at elaborating elements for such an agreement, the European Communities' draft of 28 July 1999 has been considerably revised, taking into account observations made by other delegations. The European Communities are pleased to share the results of this work with the Members of the Working Group. The proposed text favours a "principles-oriented approach" to transparency in government procurement. In the European Communities' view, it is not necessary in this context to impose one single set of rules onto Members that have widely diverging systems and, in some cases, limited resources.

The European Communities have understood from many delegations that the attached draft has, on most points, struck a fair balance between the different views. It is, however, clear that on some issues of importance, the European Communities' position is either misunderstood or not (yet) shared by certain other Members. The European Communities appreciate that the mandate of the Working Group is limited to elements on transparency in government procurement. Nevertheless, during this exercise it became clear that introducing multilateral rules on transparency in procurement will not be sufficient to resolve possible distortions in procurement practices. Therefore, further work on additional multilateral rules on government procurement is necessary. Obviously, commencing any such negotiations does not imply an automatic opening of procurement markets, but it will create a rules-based environment.

ATTACHMENT

ELEMENTS FOR AN AGREEMENT ON TRANSPARENCY IN GOVERNMENT PROCUREMENT

Members,

Recognizing the need to further the objectives of the GATT 1994 and of the General Agreement on Trade in Services,

Desiring to render more transparent the legislation and administrative procedures applied in government procurement,

Taking into account the needs of developing country Members in particular with respect to trade and administration,

Realizing that further negotiations are necessary to ensure that governments obtain the best value for money in their procurement practices,

Desiring to provide for a consultative mechanism and the effective and equitable resolution of disputes arising under this Agreement, taking account of the peculiarities of government procurement,

Hereby *agree* as follows:

Article 1

General Objective

1. This Agreement aims at ensuring transparency throughout government procurement covered by GATT 1994 and GATS.
2. The requirements under this Agreement shall be met on a non-discriminatory basis.
3. Members shall adopt and apply their legislation in good faith so as not to undermine the aims of this Agreement.

PART I: DEFINITIONS AND SCOPE

Article 2

Scope

1. This Agreement applies to procurement by governmental agencies of products¹ and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale, without prejudice to Articles XX and XXI of GATT 1994 and Articles XIV and XIVbis of GATS, as appropriate.

¹ "Products" in the context of this Agreement include products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale.

2. Notwithstanding the obligation for any procurement to be transparent, any Member may limit the application of Articles 5.1, 5.2, 5.3, 6, 7, 8.3, 9.2 and 14.1 of this Agreement to procurement above the following amounts:

<i>Maximum threshold</i>	<i>Applicable for:</i>
130,000 SDRs	central government contracts for supply of products and services,
200,000 SDRs	sub-central government contracts for supply of products and services,
400,000 SDRs	public enterprise contracts for supply of products and services,
5,000,000 SDRs	all contracts for public works,

provided Member's legislation contains clear and unambiguous provisions on contract valuation.

3. Members shall ensure that procuring entities do not divide intended procurements for the purposes of avoiding application of this Agreement.

PART II: PRINCIPLES OF TRANSPARENCY

Article 3

Public Accessibility of Domestic Legislation

1. Without prejudice to the obligations in Article X:1 of GATT and Article III:1 and 2 of GATS, each Member shall ensure that through a public medium its laws implementing this Agreement, procurement regulations and all administrative rulings of general application in connection with procurement, and all amendments thereof (hereafter: "laws and regulations"), are readily and easily accessible.

2. Members shall notify the WTO Secretariat of the (electronic) medium used. Information shall be provided at no more than the cost of copying and despatch.

Article 4

Methods of Procurement

1. Irrespective of the methods of government procurement used, they shall be specified in advance and applied in accordance with the laws and regulations. The procurement method chosen shall be transparent in accordance with the requirements of this Agreement.

2. Each procuring entity shall ensure that technical specifications are not prepared, adapted or applied in a manner that constitutes a disguised means of achieving objectives which are unrelated to that entity's procurement functions.

Article 5

Tendering Procedures

1. Wherever Members resort to government procurement through open tendering procedures, they shall publicise all necessary information and amendments thereof through an accessible source within sufficient time for potentially interested suppliers to respond in a meaningful manner.²

² This paragraph also covers pre-qualification procedures, wherever applicable.

2. The information referred to in paragraph 1 shall be adequate to allow suppliers to assess their potential interest in a particular procurement and, should they wish to participate in the procurement process, to submit responsive bids. Such information shall at least include:

- (a) name of the procuring entity;
- (b) the goods or services to be procured, and their specifications;
- (c) the procurement procedure used;
- (d) any (pre-)qualification requirements;
- (e) any restrictions on market access and/or domestic preferences granted;
- (f) the contact details for obtaining tender documentation and additional information;
- (g) the award criteria;
- (h) the deadlines for the submission of tenders; and
- (i) the date and time for the opening of tenders.

3. Members shall ensure that the information referred to in paragraph 2 is made available through the use of tender notices, tender documentation, or by other means, provided they allow for broad and easy access to potentially interested suppliers or service providers.

4. Members shall ensure that their laws and regulations clearly prescribe the conditions and, if applicable, thresholds under which procuring entities may choose to utilise procurement methods in which information on the procurement opportunity is provided only to one supplier or to a limited number of suppliers selected in advance by the procuring entity. Members shall ensure that procuring entities do not utilise such methods for the purposes of restricting participation in the procurement process in a non-transparent manner.

Article 6

Bid Periods

1. Sufficient time should be allowed for the preparation, submission and receipt of responsive bids. Time-limits set should not undermine the principles and objectives of this Agreement. They should take account of the particular circumstances as well as the complexity of the envisaged procurement.

2. Members shall clearly define in advance their policy on whether and in what circumstances late tenders may be accepted.

Article 7

Decisions on (Pre-)qualification and Contract Awards

1. Decisions on (pre-)qualification and contract awards shall be taken on the basis of the conditions and criteria (including technical specifications) which have been made known in advance, e.g. through a tender notice or tender documentation. Notwithstanding Article 6.2, only bids of

suppliers whose tenders have been received before the previously published final date for submission of tenders may be considered.

2. Once the contract is awarded, the participating suppliers shall be informed of the rejection of their bid. Unsuccessful bidders can, on request, obtain more detailed information as to why their bid was rejected and/or the winning bid was chosen.

Article 8

Domestic Review

1. Each Member shall maintain fair and transparent judicial, arbitral or administrative review bodies or procedures for the purpose, *inter alia*, of the prompt review of decisions of procuring entities creating legal effects.

2. Such bodies and procedures shall operate independently of the procuring entities and shall provide all interested parties that are directly and individually affected by a decision as mentioned in paragraph 1 with access to review.

3. Members shall ensure that each procuring entity is able to respond to requests for information on the way the procurement was carried out by maintaining a comprehensive administrative record of the procurement proceeding.

Article 9

Confidentiality

1. Any information which is by nature confidential shall be treated as such by the procuring entities. Such confidential information shall not be disclosed without specific permission of the party submitting it.

2. In case information is treated confidentially, where appropriate the procuring entities will furnish a meaningful non-confidential summary thereof.

Article 10

Language

Except if otherwise laid down in this Agreement, Members are encouraged to ensure that all information referred to in this Agreement is provided in a WTO language.

PART III: GENERAL PROVISIONS

Article 11

Notification Requirements

Laws and regulations shall be promptly notified to the WTO Secretariat. Members shall further provide a list in one of the WTO languages of the relevant generally applicable instruments. The WTO Secretariat shall endeavour to make such lists available to the general public through an electronic medium.

Article 12

Requests for Information

On request by another Member, Members shall provide information and explanations on their laws and regulations, procedures and practices affecting the implementation and operation of this Agreement.

Article 13

Dispute Settlement

1. The provisions of Articles XXII and XXIII of GATT 1994 or Articles XXII and XXIII of GATS respectively, as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes under the WTO Agreement (hereinafter referred to as the "Dispute Settlement Understanding") shall be applicable within the limitations specified below.

2. The scope of paragraph 1 is limited to disputes among Members regarding the implementation of this Agreement and to decisions of the bodies mentioned in Article 8.1 for as far as such decisions concern procurements exceeding the maximum thresholds listed in Article 2.2.

3. In the case of a dispute in which provisions both of this Agreement and of one or more other Agreements listed in Appendix 1 of the Dispute Settlement Understanding are invoked by one of the parties to the dispute, paragraphs 1 and 2 shall apply only to issues of interpretation and application relating to this Agreement.

4. Panels established to examine disputes under this Agreement shall include at least one person qualified in the area of government procurement.

Article 14

Committee on Transparency in Government Procurement

1. The Committee on Transparency in Government Procurement ("the Committee") shall review promptly any particular matter which a Member considers to be detrimental to its interests under this Agreement and where consultations between it and the Member(s) concerned have failed to produce a mutually satisfactory solution. On such matters, the Committee may make such observations as it deems appropriate.

2. The Committee shall review the implementation and provisions of this Agreement, including the thresholds mentioned in Article 2.2, two years after its entry into force and periodically thereafter.

3. After the entry into force of this Agreement, the Committee shall initiate a study how to achieve "best value for money" in government procurement and develop elements for further multilateral rules for adoption in due course.

Article 15

Use of Information Technology

Members are encouraged to make use to the largest extent possible of tools of information technology to disseminate information, in particular for the dissemination of information about procurement opportunities and contract awards.³

Article 16

Technical Assistance

In order to facilitate the implementation of this Agreement, Members shall provide, on request and on mutually agreed terms and conditions, technical cooperation to developing and least developed country Members. Parties recognize in particular the need for developing countries to receive technical assistance to enable them to set up and operate electronic systems for ensuring transparency of procurements.

PART IV: FINAL PROVISIONS

Article 17

Final Provisions

1. Members' implementation of the provisions of this Agreement shall not affect their rights and obligations, if any, under the WTO Agreement on Government Procurement.
2. This Agreement is without prejudice to Members' rights and obligations under GATT 1994 and GATS.

Article 18

Entry into Force

This Agreement shall be open for acceptance, by signature or otherwise, by all WTO Members. It shall enter into force on the date determined by Ministers at [...] and shall remain open for acceptance for a period of two years following that date. An acceptance following the entry into force of this Agreement shall enter into force on the thirtieth day following the date of such acceptance.

³ Members recognize the difficulties which developing countries may have in applying tools of information technology.