

COMMUNICATION FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

Proposal for Disciplines on Licensing Procedures

The following communication has been received from the delegation of the European Community and its Member States with the request that it be circulated to Members of the Working Party on Domestic Regulation.

I. INTRODUCTION

1. The EC considers the development of regulatory disciplines as an important component in the current round of negotiations. Regulatory disciplines should in principle contribute to creating more appropriate, trade friendly and transparent regulatory frameworks, and thereby facilitate and promote trade in services, while taking full account of the legitimate policy objectives pursued by government regulation.

2. At the same time, disciplines on domestic regulation should help ensuring that regulation, while legitimate, is not applied with a view to undermine commitments negotiated. However, it is neither the intention nor the purpose of such disciplines to prescribe or impose certain regulatory approaches, or the substance of any domestic regulations.

3. The Working Party on Domestic Regulation under the Council for Trade in Services has an essential part to play in this work. The mandate of the Working Party on Domestic Regulation (S/L/70), in accordance with GATS Article VI:4, calls on the Working Party to develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services.

4. Discussions in the WPDR over the last years have allowed members to make significant progress towards better understanding the various concepts involved in the development of disciplines under Article VI:4, as well as to the potential scope of such disciplines. The more focused approach adopted allowed members to start to move from the abstract to the concrete, in particular through the review of the *actual regulatory issues*¹ that relate to Article VI:4. The EC considers these discussions and review very useful in assisting members to better identify the kind of regulatory barriers which any disciplines under Article VI:4 should address, and what form and scope of application any future disciplines could have.

5. Members also discussed the question whether any future disciplines under Article VI:4 should adopt a horizontal approach, or should be developed on a sectoral basis. The EC is of the view that these two approaches should not be seen as mutually exclusive.

¹ JOB(02)/20, and revisions.

6. Disciplines under Article VI:4 should be sufficiently clear and precise to allow clear implementation. The EC considers that there should be no overlap between Articles XVI and XVII, which belong to Part III of the GATS, and Article VI, which belongs to Part II on general obligations and disciplines. Therefore, measures subject to scheduling under Articles XVI and XVII of the GATS would not be addressed by disciplines under Article VI:4.

7. Such an approach also does not preclude work on the development of other regulatory principles that may be deemed necessary but are not within the scope of Article VI. It is clear that regulatory measures are not always the same in all sectors. A wide range of regulatory measures fall outside the scope of measures which are supposed to be addressed by Article VI:4, such as for instance the question of the independence of regulators, universal service obligations, access to networks or essential facilities.

8. Some of these regulatory issues could be addressed through different approaches if members felt the need to do so. Approaches which have been discussed by members, both within the WPDR, as well as in other *fora*, range from disciplines addressing only transparency of regulations, to horizontal disciplines combining transparency and the specific criteria listed in Article VI:4 (a) to (c), sectoral disciplines based on the same criteria, as well as disciplines 'tailored' to specific sectors (e.g. a reference papers dealing also with issues such as universal service obligations, or access to networks, etc.)

II. DEVELOPMENT OF DISCIPLINES ON DOMESTIC REGULATION - THE CASE FOR LICENSING PROCEDURES

9. The Chair of the WPDR suggested that Members work towards some common elements that could form the basis, or indicate the general shape, of possible future disciplines². The EC has welcomed this suggestion as it should help to further focus our work. In line with this suggestion, this communication intends to contribute to the development of such common elements with regard to disciplines addressing licensing procedures.

10. Disciplines on licensing procedures would not address the substance of regulation, including the 'prudential carve-out', i.e. the substantive requirements to be fulfilled to obtain a licence. While such an approach would still leave it up to each Member to determine the 'regulatory intensity' of, and substantial requirements for the granting of a licence in, each service sector, it would ensure that the procedures under which a licence is to be obtained are subject to some basic, common rules to avoid that they become unnecessary barriers to trade in services.

11. To recall, Article VI:4 calls for the development of disciplines which should aim to ensure *that measures relating to qualification requirement and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Such disciplines shall aim to ensure that such requirements are, inter alia,*

- (a) Based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to ensure the quality of the service;
- (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Subparagraph (c) of Article VI:4 implicitly recognises that licensing procedures in themselves can create significant barriers to the supply of services. This has, in the EC's view, been confirmed by

² JOB(02)/46, dated 29 May 2002.

the review of the *actual regulatory examples*, as well as information obtained from European services suppliers on trade barriers encountered in third countries.

12. This focus on licensing procedures does not intend to exclude any of the other issues under the mandate of Article VI:4. Nevertheless, the EC considers that disciplines on licensing procedures are a useful starting point. Licensing procedures can potentially constitute significant barriers to trade in services in all sectors even though they should only be a means to handle an application for a licence.

13. Licensing procedures are understood to be the administrative procedures relating to the submission and processing of an application for a licence³, covering such matters as time frames for the processing of a licence, and the number of documents and the amount of information required in the application for a licence.⁴

14. Disciplines on licensing procedures should address:

- (a) Transparency of procedures, by building on existing principles and disciplines contained in Article III and VI,
- (b) the potential trade restrictiveness of licensing procedures, on the basis of Article VI:4,
- (c) procedures related to review of, and where justified, appropriate remedies for, administrative decisions on applications for licences, building on the provisions of Article VI:2.

15. Disciplines on licensing procedures in services have been developed in the context of, amongst others, the 'Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64)', and in the context of the Reference Paper on Basic Telecommunication Services . These existing provisions are of a general nature, and constitute a useful point of reference for the development of disciplines addressing licensing procedures in all service sectors.

16. Building upon the principles of GATS Articles III, VI:2 and VI:4, section III suggests elements for possible disciplines on licensing procedures. Such disciplines should ensure that licensing procedures:

- are pre-established, publicly available, and based on objective criteria;
- identify activities, terms and conditions;
- include all critical information for valid completion of applications;
- include relevant timeframe and critical deadlines (at least indicative ones);
- identify the competent authority;
- identify the appeal procedure.

³ The GATS does not define the term 'licence'. Given that different terms may be used in different regulatory systems, this communication adopts a relatively wide concept of the term 'licence', covering licences, authorisations, permits, for which certain requirements have to be fulfilled in order to obtain permission to supply a service. This would also include automatic authorisation procedures, that is where approval for the supply of a service is granted in all cases. See proposed definition of 'licensing procedures' under section III, General Principles.

⁴ Definition put forward in a Secretariat background paper S/WPPS/W/9, 11 September 1996.

III. ELEMENTS FOR DISCIPLINES ON LICENSING PROCEDURES⁵

General principles

17. Members shall ensure that licensing procedures are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in services, and do not constitute, in themselves, a restriction on the supply of services. [GATS VI:4(c), AD 2)

18. Where a licence is required for the provision of a service, the following disciplines shall apply.

19. For the purpose of these disciplines, licensing procedures are defined as procedures to be followed for the submission and processing of applications under a licensing or other authorisation regime requiring the submission of an application or other documentation to the relevant administrative/regulatory body as a prior condition for the supply of a service in the territory of a member. [AILP 1.1]

1. General provisions on licensing procedures

1. Licensing procedures shall be pre-established, publicly available and objective. [AD 14]
2. Licensing procedures shall be neutral in application and administered in a reasonable, objective and impartial manner. [AILP 1.3]
3. The decision of and the procedures used by the competent authority preparing, adopting or applying licensing procedures shall be impartial with respect to all market participants. In particular, it shall be separate from any supplier of services for which a licence is required.

1.1 Application procedures

4. Application procedures and, where applicable, renewal procedures shall be as simple as possible. Applicants shall be allowed a reasonable period for the submission of licence applications. Applicants shall, in principle, have to approach only one competent authority in connection with an application for a licence. [AILP 1.6]
5. Application for licences shall, wherever feasible, be possible at any time, and shall be processed upon receipt. Wherever possible, applications should be accepted in electronic format under the same conditions of authenticity as paper submissions. [AD 15]

1.2 Documentation

6. Documentation requirements for obtaining a licence shall not impose unreasonable requirements regarding the format of documentation. [AD 15]

⁵ Most of the elements and language used are based on existing texts, in particular Article VI of the GATS, the *Disciplines on Domestic Regulation in the Accountancy Sector (S/L/64, hereafter AD)*, and the *Agreement on Import Licensing Procedures (hereafter AILP)* and the *Reference Paper for Telecommunication Services (RP)*. The source of those provisions which are based on, or inspired by, such existing provisions will be indicated in brackets at the end of each paragraph. In most cases, though, the text will not be identical to the source.

7. The establishment of the authenticity of documents shall be sought through procedures which are pre-established, publicly available and, wherever possible, authenticated copies should be accepted in place of original documents. [AD 15]
8. The competent authorities shall, after receipt of an application, inform the applicant whether the application is considered complete under the Member's domestic laws and regulation and in the case of incomplete applications, identify the additional information that is required to complete the application and provide the opportunity to correct deficiencies within a reasonable timeframe. [GATS VI:3]

1.3 Decisions

9. Decisions are to be taken promptly on all applications, and at the least within the normal timeframe established and published by the competent authorities, as stipulated under 2(a). Such timeframe may reflect public consultation processes where foreseen.

1.4 Fees

10. Any fees charged, which are not deemed to include fees determined through auction or a tendering process, are to be commensurate with the administrative cost of processing an application. [AD 13]

1.5 Entry into force

11. A licence, once granted, shall enter into effect immediately, in accordance with the terms and conditions specified therein. Such conditions may, in themselves, delay entry into effect. [AD 18]

2. Transparency of licensing procedures

12. Members shall make publicly available, or shall ensure that their competent authorities make publicly available, including through the enquiry and contact points, and in an easily accessible manner, where possible by electronic means: [AD 3]
 - (a) All the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence; [RP 4(a)]
 - (b) the lists of service activities subject to licensing requirement,
 - (c) the names and addresses of the competent authorities (i.e. governmental or non-governmental entities responsible for the licensing of service suppliers) to be approached, [AD 3]
 - (d) the terms and conditions of individual licences; [RP 4(b)]
 - (e) requirements and procedures to obtain, renew or retain any licences and the competent authorities' monitoring arrangements for ensuring compliance; [AD 4(b)]
 - (f) information on technical standards to be fulfilled by the licensee; [AD 4(c)]
 - (g) the eligibility of persons, firms and institutions to make such applications; [AILP 1.4(a)]

- (h) where there is public involvement in the licensing process, information on how that involvement is provided for.
- 13. Any exception, derogation or changes in or from the rules concerning licensing procedures or the list of service activities subject to licensing shall also be published in the same manner as specified above. [AILP 4(a)]
- 14. When introducing or changing licensing procedures in a way which would significantly affect trade in services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments, before any new or changed licensing procedures would come into effect. [AD 6]

3. Review of licensing decisions

- 15. Members shall specify, or shall ensure that their competent authorities specify, reasonable time frames for review and decision by all relevant authorities.
 - 16. If an application is denied, the applicant will be informed in writing and without delay. An unsuccessful applicant shall be informed of the reasons for rejection of the application, as well as if the possibility for an appeal against the decision exists. An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing. [AD 17]
 - 17. Details of procedures for the review of licensing decisions, as well as any procedures for appeal of licensing decisions, shall be made public, including the prescribed time limits, if any, for requesting such a review.
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