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GATS Coverage of Telecom Regulatory Issues

The attached communication is circulated at the request of the European Community and its Member States to Members of the Negotiating Group on Basic Telecommunications.

GATS COVERAGE OF TELECOM REGULATORY ISSUES

1. Introduction - Scope of the GATS

All "measures" taken by a GATS Member government or by a National Regulatory Authority in the field of telecom, fall within the scope of the GATS Agreement.¹

It follows that, in a sector in which specific commitments are made, any measures which constitutes a restriction on market access within the sense of Article XVI GATS (for instance, restrictions on foreign ownership of telecom service suppliers), or which discriminates against services and service suppliers of another Member within the sense of Article XVII GATS, must be scheduled in order to be maintained. Moreover, regardless of specific commitments, Article II GATS on most-favoured-nation treatment (mfn) is applicable (unless an exemption from mfn is listed). MFN is an obligation of non-discrimination between service suppliers of different Members. Specific commitments must be on the basis of most-favoured-nation treatment.

The object of this paper is principally to examine the disciplines existing in the GATS in relation to the telecom regulatory measures mentioned below when such measures do not constitute restrictions on either Article XVI or XVII GATS.

2. There has been considerable discussion among NGBT participants of the need to develop sector-specific provisions for basic telecommunications if GATS specific commitments in the sector are to be effective and meaningful. The need for sector-specific provisions presupposes that the existing GATS is inadequate for the basic telecommunications sector. The European Community and its Member States have examined the application of the GATS with reference to the regulatory issues defined in Secretariat paper TS/NGBT/W/2. This paper is a technical contribution to the on-going debate intended to focus future discussion.

In the context of work on the "draft model schedule" at the end of 1993, certain regulatory issues were identified as requiring further work. GATT Secretariat paper TS/NGBT/W/2 subsequently listed these issues:

- measures relating to licensing;
- interconnection;
- competitive safeguards;
- transparency requirements;
- separation of regulatory and operational functions;
- access to frequency spectrum;
- numbering;
- standards;

¹The GATS applies to "measures by Members affecting trade in services" - Article I.1. "Measures" is defined as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form" (Article XVIII(a)) and includes measures taken by "central, regional or local governments or authorities" and by "non-governmental authorities in the exercise of powers delegated by central, regional or local government authorities" - Article I.3(a).

- tariffs and cost issues;
- . environmental and town planning considerations affecting infrastructure installation and rights of way.

This paper seeks to examine the existing GATS disciplines in relation to each of these issues. The paper is structured under general headings. It should be noted that many of the issues relevant to these headings overlap.

In terms of achieving effective and meaningful specific commitments in the NGBT, the European Community and its Member States have identified measures relating to *licensing*, *interconnection*, *competitive safeguards* and *universal/public service obligations* as being among the most important issues.

3. Measures relating to licensing

Articles VI, XVI, XVII and XVIII GATS and paragraph 5 of the Telecom Annex apply to licensing procedures and criteria in sectors in which specific commitments are undertaken. The GATS accepts that a Member may impose a requirement of a licence or other form of authorization for the supply of a service in its territory. Such a requirement in itself is not considered to be a restriction on market access.

Three separate issues can be identified in relation to licensing:

- *licensing procedures: how the decision to grant a licence is made and the possibility of review;*
- *licensing criteria: the criteria in accordance with which a licence is granted; and*
- *licensing conditions: the conditions attached to a licence, for instance universal service obligations.*

These issues are dealt with in the GATS as follows:

Procedures: Applications must be told whether or not the licence will be granted "within a reasonable period of time after the submission of an application".² Applicants have the right to request regulatory authorities to provide them with information concerning the status of the application "without undue delay".³ Service suppliers who are affected by administrative decisions concerning trade in services must be offered recourse against these decisions, that is the possibility of review and where appropriate remedies.⁴

²Article VI.3 GATS.

³Article VI.3 GATS.

⁴Article VI.2 GATS.

Licensing procedures are also mentioned in Article VI.4(c) in relation to the development of disciplines necessary to ensure that the procedures are not in themselves a restriction on the supply of services (see point on criteria below for in relation to Article VI.4). The GATS does not mandate that Members use one form of procedure over another. It would be possible to do so in the context of an Article VI.4 work programme. However, the object of Article VI is not to "harmonize" Members' licensing procedures, but rather to discipline such procedures to prevent them from restricting trade.

Criteria: The application of the GATS to licensing criteria depends on the nature of those criteria. Where a criterion to obtain a licence has a maximum quantitative element in terms of Article XVI on market access (for instance, only X licences will be granted, licenses are subject to an economic needs test or the eligibility of an applicant depends on not exceeding a certain percentage of foreign participation), then that criterion required to be scheduled. Likewise, any discriminatory qualitative criteria must be scheduled under Article XVII on national treatment. (Articles XVI and XVII apply only to sectors in which specific commitments are undertaken). Where a Member applies licensing criteria which are incompatible with Article II on most-favoured-nation treatment, for instance by subjecting the granting of licences to a test of reciprocity, then the possibility for that Member to make specific commitments is affected, as specific commitments must be on the basis of most-favoured-nation treatment.

Conditions which are outside the scope of Articles XVI, XVII and II are subject to Article VI. Article VI applies to sectors in which specific commitments are undertaken. Paragraph 4 of this Article (the sole paragraph to apply regardless of specific commitments) envisages the "development of the necessary disciplines" to ensure that qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. These disciplines would aim at ensuring that 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."

Pending the development of these disciplines, paragraph 5 prevents Members from applying licensing requirements which would "nullify or impair its specific commitments in a manner which:

- (i) does not comply with the criteria outlined in sub-paragraphs 4(a), (b) or (c) (above); or
- (ii) could not reasonably have been expected of the Member at the time the specific commitments were undertaken."

Moreover, the GATS Annex on Telecommunications specifies the conditions which can be taken into account in authorizing "access to and use of public telecommunications transport networks and services" (PTTNS) in its paragraph 5. Paragraphs 5(e) and 5(f) of the Telecom Annex thus aim at limiting undue restrictions to the access to and use of PTTNS. Interpretation of the conditions for access to and use of PTTNS by Members will also fall within the realm of Article VI and will therefore be subject to the disciplines of that Article outlined above.

The treatment to be accorded to criteria for the granting of a licence which are vague or discretionary, such as "public interest criteria" or "tests of public necessity and convenience" has been the subject of discussion throughout the Uruguay Round. The Community has consistently maintained that such criteria cannot be scheduled under Article XVI, as they are insufficiently precise. Moreover, the Community has consistently doubted whether such criteria are "based on objective and transparent criteria" as Article VI.4 and 5 required. (Unlike Articles XVI and XVII, Members may not schedule restrictions on measures which are not compatible with Article VI).

Licensing criteria which are not compatible with Article VI GATS must be eliminated, and the licensing process made compatible with the obligations of Article VI GATS.

Conditions: It can be seen from the above that Article VI is a "negative obligation" in relation to licensing procedures and criteria. It does not seek positively to mandate a particular licensing procedure over another, nor does it impose particular criteria for the award of licences or conditions which must be included in licences. It seeks rather to limit the liberty of Members to the extent necessary to prevent undue restrictions on trade in services. However, it is conceivable in the context of an Article VI.4 work programme to develop the necessary disciplines that particular licensing procedures, criteria or conditions would be favoured over others.

Although the identification of licensing procedures and criteria which are compatible with Article VI anticipates the establishment of a work programme on these issues which is expressly foreseen in Article VI.4, the issue is of sufficient importance in terms of securing meaningful commitments that it should be followed up. Indeed, there is little point in addressing other regulatory issues in the NGBT, such as interconnection, if service suppliers of other Members are unable to obtain a licence on GATS-compatible terms.

4. Interconnection

The establishment of a regulatory framework governing interconnection conditions between service suppliers and network operators and between network operators is a crucial element of the liberalization of basic telecommunications. As such, it has been addressed within the Community in relation to telecommunications services in the context of Open Network Provision and is addressed at some length in Part II of the Commission Green Paper on intra-Community liberalization of infrastructure. Part II of this Commission Green Paper, makes explicit reference to the linkage between interconnection and universal service obligations. Hence, beyond the competitive aspects, the definition of a regulatory framework on interconnection in a liberalized environment aims to guarantee the universal availability of public telecommunications services and infrastructure.

The term interconnection can address a number of situations:

- interconnection of a non-facilities-based service supplier to a facilities-based service supplier;
- interconnection of two non-facilities-based service suppliers; and
- interconnection between two facilities-based service suppliers.

Interconnection of a non-facilities-based service supplier to a network operator

The Telecom Annex applies to "all measures of a Member that affect access to and use of public telecommunications transport networks and services (PTTNS)"⁵. Public telecommunications transport service is defined as:

- "any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, inter alia, telegraph, telephone, telex and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information".

Paragraph 5 of the Annex requires Members to ensure that services suppliers of other Members have access to and use of PTTNS on reasonable and non-discriminatory terms and conditions for the supply of a service included in their schedules. Non-discriminatory is to be understood to refer to mfn and national treatment as defined in the GATS "as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other like user of PTTNS under like circumstances". Paragraph 5 goes on to specify that Members must ensure that:

- terminal equipment can be attached;
- private leased or owned circuits can be interconnected; and
- the protocols of the service supplier's choice can be used, other than as necessary to ensure the availability of telecom networks and services to the public generally.

However, in accordance with paragraph 5, Members are entitled to make such access to and use of the PTTNS subject to conditions, although only those necessary to ensure public service obligations, technical integrity of the network and that service suppliers do not supply services unless permitted pursuant to specific commitments.

Interconnection between two non-facilities-based service suppliers

Given that paragraph 5 of the Telecom Annex is applicable both to public telecommunications transport networks and services (PTTNS), it covers interconnection of a non-facilities-based service supplier to a public telecommunications service supplier in the same way as outlined above.

Interconnection between two facilities-based service suppliers

Certain NGBT participants have stated that the Telecom Annex does not cover network-to-network interconnection. However, the scope of the Telecom Annex is not explicitly limited. Indeed, paragraph 5(a) of the Telecom Annex states only that:

"Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its schedule (...)".

The fact that paragraph 5(b) refers explicitly to "private leased circuits" does not preclude that network-to-network interconnection is also covered.

⁵Measures affecting the cable or broadcast distribution of radio or television programming are explicitly excluded from the scope of the Annex in paragraph 2.2.

In particular, where a Member makes a specific commitment on the supply of basic telecom services on a facilities-basis, that Member might be said to have an obligation to ensure the necessary access to and use of the PTTNS (of paragraph 5(a)) which would include interconnection of networks.

Separately, disciplines in the existing GATS might be said to oblige a Member to regulate interconnection between facilities-based service suppliers. Three articles of the GATS appear to be particularly relevant: Articles VI, VIII and IX.

In certain countries, the question of interconnection is dealt with essentially in the individual licences granted to facilities-based service suppliers. This means that the rights and obligations in relation to interconnection, including the terms and conditions of interconnection, are dependent on the interrelation between these various licences. As has been pointed out at point 3 above in relation to licences, Article VI GATS does not require Members to include particular conditions in licences which it grants to service suppliers within its territory. It follows that the GATS does not comprise an obligation to deal with the question of interconnection in the licences of telecom service suppliers (however, please see below in relation to the disciplines contained in Article VIII GATS in relation to interconnection).

Nonetheless, it would be possible to agree among NGBT participants that general principles in relation to network-to-network interconnection should be included in telecom licences. Dealing with the matter in this way under Article VI would cover situations in which Members make specific commitments on the provision of basic telecom services on a facilities basis.

Article VIII GATS concerns monopoly and exclusive service suppliers, whether *de jure* or *de facto*. Sole suppliers on a specific relevant market and exclusive service suppliers on such a market, will be subject to Article VIII if the conditions of that Article are met, i.e. that the Member is involved in the maintenance of the monopoly or exclusive service supplier. In relation to monopoly service suppliers, Article XXVIII makes clear that the Member may authorize or establish such a service supplier formally or in effect. Operators of certain "bottleneck facilities" will fall within the scope of Article VIII. However, it will be necessary to examine such situation individually before arriving at this conclusion in relation to a specific operator. All dominant carriers will not necessarily fall within Article VIII. This question requires to be examined further.

Article VIII obliges a Member to ensure that such service suppliers within its territory do not act in a manner inconsistent with either mfn or its specific commitments. The extent of behaviour inconsistent with specific commitments falling under Article VIII is open to interpretation. Article VIII might be said to prevent such suppliers from refusing interconnection (this would certainly be the case if a specific commitment on the provision of service by resale were made). It might also be said to prevent such suppliers from "abusing their dominant position" in areas subject to competition by discriminating between other service suppliers in the terms of interconnection (this point is made explicitly in the Telecom Annex in relation to interconnection of non-facilities-based service suppliers to a network operator, see above).

There is thus a need for clarification both of the service suppliers subject to Article VIII and of the exact extent of the obligations imposed on Members in relation to interconnection in their regulation of monopoly and exclusive service suppliers.

Article IX on restrictive business practices will apply to dominant carriers which are neither monopolies, nor exclusive service suppliers within the terms of Article VIII. It foresees no more than consultations between the relevant Members if one of them experiences problems in the territory of another as a result of such practices. It imposes no disciplines beyond that.

Thus, the extent of GATS disciplines in relation to network-to-network interconnection further to the Telecom Annex and Articles VI and VIII requires to be examined further. Although interconnection is not relevant only to "dominant carriers" and must be addressed in a broader perspective than Article VIII in order to maintain the universal availability of public telecommunications services and infrastructure.

5. Universal/public service

As with a number of the telecom regulatory issues described above, the sole GATS disciplines to apply are those contained in Articles VI.1 and 2 and possibly VI.3, 4 and 5 (with the usual proviso that if the regulation were to discriminate against services and service suppliers of other Members, it would require to be scheduled under Article XVII). This means that Members are free to regulate basic telecommunications taking into account universal/public service obligations as they see fit, provided that the regulation is reasonable, objective and impartial and that any related conditions in licences are based on objective and transparent criteria and are not more burdensome than necessary. In addition, it should be noted that paragraph 5 of the Telecom Annex exhaustively lists the reasons for which Members may limit access to and use of PTTNS, although the interpretation of these is subject to Article VI. Public service obligations are explicitly mentioned as being of relevance.

6. Competitive safeguards

Discussions between NGBT participants have revealed that the term competitive safeguards is often used specifically to design regulatory measures which apply to dominant carriers such as measures on interconnection, practices of regulatory authorities in relation to licensing conditions, and even mechanisms which allow end-users to have recourse against decisions of public authorities and/or dominant carriers.

In this light, the term competitive safeguards refers almost to horizontal issues of good regulatory practice which are addressed generally throughout the GATS framework text. In terms of the GATS, it is possible to conclude that competitive safeguards covers all regulatory issues, whatever the level of relationship between the parties, provided that they are governmental "measures".

The term competitive safeguards might include measures to deal with situations where the regulator of a Member sees a need to control the situation at the other end of an international service where the regulator may have no jurisdiction. Some competitive safeguards may appear to be inconsistent with most-favoured-nation treatment (Article II GATS). However, where these measures are designed to address specific difficulties and do not discriminate between service suppliers on the basis of nationality, they could be considered to be legitimate competitive safeguards. This is not the case of measures which condition the market access of a service supplier of another Member to an examination of whether that other Member affords equivalent market opportunities in its territory. There is a need for clarification of this point among NGBT participants.

7. Transparency requirements

Article III of the GATS requires Members to make public "all relevant measures of general application which pertain to or affect" the operation of the Agreement. International agreements are also to be published. There is an obligation to inform the Council for Trade in Services at least annually of "any new, or any changes to existing laws, regulations or administrative guidelines" which significantly affect trade in services in sectors covered by specific commitments.

Article III does not apply to decisions affecting a particular service supplier, for instance terms and conditions of licences or of interconnection terms mediated by the regulatory authority in a particular case. Moreover, Article III bis explicitly excludes from the obligation of transparency the disclosure of confidential information which would be "contrary to the public interest or which would prejudice legitimate commercial interests of particular enterprises, public or private".

Paragraph 4 of the GATS Annex on Telecommunications expands upon the provisions of Article III. It requires Members to:

- "ensure that relevant information on the conditions affecting access to and use of public telecommunications transport networks and services is publicly available including tariffs and other terms and conditions of service, specifications of technical interfaces with such networks and services, information on bodies responsible for the preparation and adoption of standards affecting such access to and use, conditions applying for attachment of terminal or other equipment, and notifications, registration or licensing requirements, if any".

It is necessary to clarify the inter-relation between paragraph 4 of the Telecom Annex which applies to tariffs and terms and conditions for access to and use of the PTTNS and the provisions of Article III bis which allow Members not to make public, information which would prejudice legitimate commercial interests. Article III bis GATS is a general provision which should prevail over paragraph 4.

Moreover, paragraph 4 will apply to all tariffs, terms and conditions for all forms of access to and use of PTTNS, i.e. both interconnection of a non-facilities-based service supplier to a network operator and network-to-network interconnection.

8. Separation of regulatory and operational functions

Within the Community, the separation of regulatory and operational functions was central to the liberalization of telecom services.

Nothing in the GATS requires Members to adopt a particular regulatory structure. The GATS examines only the "measures" which are taken by that regulatory authority and requires them to be reasonable, objective and impartial⁶ in sectors in which specific commitments are undertaken. Moreover, affected service suppliers must have recourse against administrative decisions, that is the possibility of review and where appropriate remedies.⁷

This means that Members may maintain telecom regulatory authorities which are not independent from the telecom operator without breaching GATS obligations, provided that the measures themselves are compatible with Article VI.

Where a service supplier subject to Article VIII is also responsible for regulation, the Member may have an obligation to ensure that such a service supplier does not abuse this power (please refer to point 4 above for details of Article VIII).

⁶Article VI.1 GATS.

⁷Article VI.2 GATS.

9. Access to frequency spectrum and numbering

The manner in which frequency is allotted to service suppliers varies from Member to Member, for instance first come, first served or auctions. Numbering is also dealt with in a variety of ways.

Paragraphs 1 and 2 of Article VI require frequency to be allotted and numbers to be distributed in a reasonable, objective and impartial manner; there must be a possibility of review and, where appropriate, remedies against administrative decisions affecting a service supplier.

Given that access to frequency and/or to numbering is a precondition for obtaining authorization to provide services, Article VI.4(c) is also relevant (please refer to point 3 above).

10. Standards

Timely publication of standards is essential. This is dealt with in Article III GATS, and more particularly in paragraph 4 of the Telecom Annex.

Paragraph 5(f)(ii) of that Annex allows Members to require the use of specified technical interfaces for access to and use of the PTTNS.

Paragraph 7 of the Telecom Annex recognises the importance of international standards for global compatibility and inter-operability of telecom networks and services. Members have undertaken in pursuance of this paragraph to promote such standards through the work of relevant international bodies.

The GATS contains no provision on the participation of service suppliers of another Member in the standards-setting process. Participation in the European Telecommunications Standards Institute (ETSI) is open to third countries: ETSI associate members and observers participate fully in the process of developing standards. Observers do not, however, have the right to vote on the acceptance of standards.

It has been suggested that the Code on Technical Barriers to Trade (TBT), and in particular its Annex 3, the Code of Good practice for the Preparation, Adoption and Application of Standards (the code of Good practice), regulates the issue. The TBT applies only to goods and to processes of manufacturing goods. It therefore covers telecommunications equipment, but not standards related to telecommunications services.

However, where the non-participation of service suppliers of other Members in the drawing up of any form of standard is used to adopt standards which are, in themselves, restrictive of trade in services, then Article VI.4 and VI.5 would apply (please refer to point 3 where the provisions of Article VI are explained in relation to licensing conditions).

11. Tariffs and cost issues

Nothing in the GATS deals with the regulation by Members of tariffs or costs in telecommunications or indeed in any other sector (although measures discriminating against services and service suppliers of third countries must of course be scheduled under Article XVII in order to be maintained).

During the negotiation of the GATS text, there was discussion of an obligation of cost-orientation (best efforts) in the Telecommunications Annex. However, this provision met fierce opposition from certain members and was removed. The GATS thus does not require Members to enforce "cost-orientation" of prices in any sector.

The tariffs imposed by private enterprises of their own free will do not constitute "measures" of a Member and are thus outside the scope of GATS. However, tariffs and other terms of conditions of service for access to and use of the PTTNS are subject to the transparency obligation contained in paragraph 4 of the Telecom Annex.

In relation to tariffs, the GATS imposes no obligations in relation to cost-orientation, but does require tariffs for access to and use of the PTTNS to be publicly available (please refer to point 7 above).

12. Rights of way for the installation of infrastructure

The rights of Members to regulate the installation of telecom infrastructure in accordance with their environmental and planning laws is protected by Articles VI.1, VI.2, VI.4 and 5, to the extent that such considerations are based on objective and transparent criteria and are not more burdensome than necessary. Elaboration of these general principles in advance of an Article VI work programme on telecommunications appears difficult. Nonetheless, there are certain limits in the possibility of a Member to refuse rights of way for the construction of infrastructure, that is in a manner which nullifies the benefits of any specific commitments on facilities-based telecommunications service.