

COMMUNICATION FROM SWITZERLAND

Compliance with notification requirements under the GATS

The following communication, dated 10 March 2009, from the delegation of Switzerland, is being circulated to the Members of the Council for Trade in Services.

I. THE NOTIFICATION REQUIREMENTS UNDER THE GATS

1. The General Agreement on Trade in Services contains a number of notification requirements. This communication focuses principally on the requirements pursuant to Articles III and VII of the GATS. It does not elaborate on other GATS notification requirements such as Article V of the GATS.

2. Article III:3 of the GATS reads :

“Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.”

The main features of this provision are thus:

- each Member is subject to the obligation of Article III:3;
- in terms of time frame the main rule is to notify “promptly”, but as a subsidiary rule notification shall be performed “at least annually”. The term “promptly” seems to mean promptly after enactment, as the term “introduction” suggests (in contrast to the *ex ante* notification provided for in Article VII:4(b));
- the notification obligation is applicable to new acts as well as to amendments of existing acts;
- in contrast to the definition of “measures” contained in Article XXVIII of the GATS, the scope of the notification obligation is more limited to the extent that it is applicable only to “laws, regulations or administrative guidelines”, this being an exhaustive list;
- the new act, or the amendment to an existing act, must “significantly affect trade in services”. The term “Trade in services” is defined in Article I:2 of the GATS and covers all modes of supply. “Services” is defined in Article I:3(b) of the GATS;
- only acts covering services sectors that are committed are subject to Article III, which obviously captures all acts of horizontal nature (*e.g.* immigration laws, company laws, etc.).

3. A second notification requirement under the GATS relates to recognition and is provided for in Article VII:4 of the GATS, which reads:

“Each Member shall:

[...]

“(b) promptly inform the Council for Trade in Services as far in advance as possible of the opening of negotiations on an agreement or arrangement of the type referred to in paragraph 1 in order to provide adequate opportunity to any other Member to indicate their interest in participating in the negotiations before they enter a substantive phase;

“(c) promptly inform the Council for Trade in Services when it adopts new recognition measures or significantly modifies existing ones and state whether the measures are based on an agreement or arrangement of the type referred to in paragraph 1.”

The main features of this provision are thus :

- Article VII:4 applies to recognition whether based on an agreement or granted autonomously, as stated, respectively, in sub-paragraphs (b) and (c);
- the obligation of sub-paragraph (b) applies *ex ante*;
- the obligation of sub-paragraph (c) applies upon adoption of new measures or modification thereof;
- in respect of the recognition of prudential measures sub-paragraph 3(c) of the Annex on Financial Services applies;
- otherwise, Article VII:4 applies to any type of recognition referred to in paragraph 1, *i.e.* “education or experience obtained, requirements met, or licenses or certifications granted”, whether applicable to juridical or to natural persons and whether of sector-specific or of horizontal nature.

4. Other notification requirements are established under the GATS in particular under Article V:7 (Economic Integration) and V *bis* (Labour Markets Integration Agreements), Article XII:4 (Restrictions to Safeguard the Balance of Payments), Article XIV *bis* (Security Exemptions), or paragraph 7 of the Annex on Article II MFN Exemptions, this being a non exhaustive list. Sometimes, the notification requirement explicitly applies also to “changes” to the measure introduced (Article XII) or to its “termination” (Article XIV *bis*).

5. None of the notification requirements cover trade agreements of limited scope, *i.e.* those agreements that are not comprehensive enough to qualify under Article V. Members’ Lists of MFN Exemptions provide examples of such agreements. However, in cases where such agreements contain recognition provisions, the notification requirement under Article VII would apply.¹

¹ A comprehensive presentation of notification requirements is contained in the “Guidelines for notifications under the General Agreement on Trade in Services”, S/L/5 of 4 April 1995.

II. THE IMPLEMENTATION OF NOTIFICATION REQUIREMENTS UNDER THE GATS

6. A summary of notifications received under the GATS was made in July 1997.² Summaries of notifications by single Members are being presented in some respects in the context of Trade Policy Reviews. In spite of that, a general and updated evaluation of the implementation of the notification requirements under the GATS would be helpful. Without an up-to-date evaluation there is yet no concrete basis to define a direction of a work to be done in this area in the Council for Trade in Services.

7. Some indications were perceived as to potential difficulties in performing notification. For example, a better understanding of what has to be notified or of how to organize oneself - as a Member - to efficiently and promptly fulfil the requirements may be necessary in certain cases.

8. It is worthwhile examining whether there is scope or a necessity to improve, or ways to facilitate, the implementation of the notification requirements under the GATS. This relates both to the promptness of notification and to the volume (question of a possible deficit in notification).

9. A difficulty in evaluating the implementation of the notification requirements lies in the fact that figures are not the only reference. A low number of notifications may indeed either mean that implementation is poor, or that in effect only few measures "which significantly affect trade in services" were introduced. Even the absence of any notification is not *a priori* a cause for concern. The best example is Article XIV *bis*, where the quasi absence of any notification to date under this GATS provision is simply a confirmation that no such measure has ever been introduced by Members.

III. RATIONALE AND BENEFITS OF NOTIFICATION DISCIPLINES

10. Well implemented notification disciplines bring benefits in several respects. Members get to know each other better and have an opportunity, if they so wish, to exchange questions and answers on the occasion of the presentation of the notifications in the Council for Trade in Services. It allows the notifying administration to keep track of legislative processes and in particular to monitor the relationship of newly introduced legal provisions with the GATS obligations and specific commitments. Notification contributes to legislative transparency vis-à-vis trading partners and the private sector. The latter would be in a position to identify more easily new business opportunities or new trade obstacles.

11. In terms of mutual recognition agreements (MRA), notification allows Members to identify opportunities to join a specific MRA or to solicit the negotiation of a similar MRA.

12. In certain cases, a proper implementation of notification requirements is a condition to make it possible for Members to exercise their rights under the GATS. For example, only if the negotiation of a recognition agreement is notified in advance can Members indicate their interest to participate to such negotiation before it is concluded. If notification is not performed on time, the said right is frustrated. Similarly, absence of a notification under Article XII would undermine the provisions of paragraph 5 of that Article regarding consultations in the Balance of Payments Committee of the General Council.³

² See Note "Notifications under the General Agreement on Trade in Services", S/C/4 of 14 July 1997.

³ Unlike other notification requirements, restrictions to safeguard the balance of payments have to be notified to the General Council. According to S/L/5, "modalities for notifications made under Article XII:4 will be determined by the Balance of Payments Committee and the General Council".

13. Notification is, in certain cases, essential to protect the legal interest of the notifying Member itself. If a balance-of-payment restriction is duly notified in time, there is no doubt that in the view of that Member the said restriction is considered to be a BOP restriction as defined under Article XII:1. Conversely, in the absence of such notification it will be impossible for the Member, after time has passed, to retroactively argue that the restriction was intended to be introduced under Article XII.

14. Notification allows the national administration to systematically identify possible improvements of its regimes with a view to offering improvements to its GATS specific commitments. Conversely, notifications are a means for Members to identify possible areas where liberalization measures are introduced and to enquire about perspectives for improvements of specific commitments. Notification may also facilitate the work of the WTO secretariat and of Members in the context of trade policy reviews.

IV. THE ORGANIZATION OF NOTIFICATION IN A NATIONAL ADMINISTRATION

15. One characteristic of the universe of services is that it covers a great number of sectors, and thus a great number of regulators and authorities. This implies that, in order to gain in terms of efficiency, the way the process is internally organized is critical.

16. There is definitely no generally applicable “ideal” way to internally structure the notification process since each national administration has its proper culture and rules. However, basic questions or possible options do not differ significantly across national administrations. In any case, the better the organization at the national level, the better the quality of the implementation of GATS requirements.

17. By way of illustration, Switzerland has internally tested a number of options. Initially, the process was decentralized. The services team’s function was limited to dispatching at regular intervals to the ministries an explanatory note on Article III, copies of the forms and a reminder. Filling in and returning the forms was the ministries’ task. For various reasons this system was subsequently reversed. Experts in ministries complained that the form was not obvious to fill and that they needed more explanation in addition to the explanatory note, especially in case of job rotation. The system thus evolved towards a more centrally-driven process. Both the selection of the acts to be notified and the filling in of forms are now the responsibility of the services team which then sends those filled forms to the authority in charge for confirmation. Doing so made it possible to have a sort of continuous notification process as opposed to the periodical process that prevailed earlier. But more interestingly, in the end the centralized process turned out to raise the volume of notifications and to cover much more areas.

18. Switzerland is a federal state. Therefore, the issue of the notification of sub-federal measures had to be considered. Several alternative arrangements were submitted to the cantons and the choice was left to them to decide on the structure to be devised. Here again, just like the sectoral federal ministries, cantons were reluctant to have to select themselves what to notify, even when equipped with a comprehensive explanatory note. The preference expressed by the Swiss cantons was to let the services team periodically send them a request, on the basis of which they would then simply submit all legislative cantonal acts adopted over the lapsed period, irrespective of their content. It was left up to the services team to select which acts to notify and to fill in the forms.

19. The above illustrates some of the options that may be followed to structure the flow of information between regulators and the coordinating entity. Again, there is no golden rule. But what is certain is that the notification requirements can hardly be met without internally defining a clear flow of information, including a precise division of responsibilities between the sectoral authorities and the coordinating entity. To a certain extent, trial and error may be an inevitable part of establishing and improving internal procedures.

20. Focussing initially on few sectors, such as financial services, telecommunication services or immigration (Mode 4), could be a method for devising appropriate procedures that may then be extended to the entire national administration.

21. Switzerland concluded only a very limited number of recognition agreements relevant for sub-paragraph (b) of Article VII:4, as they are confined to the EC and EFTA area. In cases where recognition is just a part of comprehensive agreements covered by Article V, the internal procedure would be driven by that Article. That was the case for amendment to the EFTA Convention.⁴ In cases where mutual recognition was based on specific bilateral agreements,⁵ the situation is more difficult but normally the services team would be involved in or at least informed of the negotiating process, nevertheless to date Switzerland did not notify *ex ante*. Another critical aspect of notifying agreements under sub-paragraph (b) is to coordinate the notification process among parties to such agreement. Most Swiss notifications under Article VII relate to sub-paragraph (c), *i.e.* to autonomous recognition measures based on regulations by federal or cantonal authorities. The internal notification process would be the same as for notifying measures relevant to Article III.⁶ As the competence for recognition lies within governmental authorities solely, notification can be organized without having to involve professional bodies, which facilitates the notification process.

22. Switzerland has no experience regarding notification under other GATS provisions because no measures have been introduced under Articles XII:4 (Restrictions to Safeguard the Balance of Payments) or XIV *bis* (Security Exemptions).

V. CONCLUSIONS AND PROPOSALS

23. There may be scope to improve the manner the notification obligations under the GATS are implemented. Since the notification process involves many actors, there are as many points where possible improvements may be examined or realized. By way of illustration, some ideas are listed below.

24. To start with, the form used could be reviewed by the WTO Secretariat with the objective of making it more user-friendly, modern and efficient.⁷

25. The forms could be made available from the WTO website and could be downloaded.

26. One additional step would be to permit Members to complete – and register – the forms directly on-line. Such type of on-line notification would drastically reduce administrative operations and delays.

27. It seems that there is no precise understanding as to what exactly shall be notified, most particularly regarding the exact meaning of the sentence “significantly affect trade in services”. Members may consider mandating the WTO Secretariat with producing an informal note containing an illustrative (non exhaustive) list of typical measures “which significantly affect trade in services”, which are subject to notification. Such a list could help national services teams instruct their sectoral regulators and sub-federal entities.

28. The WTO Secretariat has recently been mandated to produce a statistical account of the notifications made over the past years. Such an account could, for example, indicate on an annual basis the total number of notifications made and the total number of Members that made those notifications. On the basis of such statistical account, Members could consider whether there is a

⁴ See S/C/N/207, notified under Article V only.

⁵ See S/C/N/31, S/C/N/33 and S/C/N/75.

⁶ See S/C/N/32, S/C/N/173 to 178, and S/C/N/385 to 387.

⁷ Form attached to document S/L/5 of 4 April 1995.

deficit in notifications. Obviously the benefit of the statistical account would be enhanced if it could be repeated annually in the future so as to permit continuous monitoring. The objective would be to trace the pace of improvement of the notification practice by Members. In addition, such monitoring document could be one reference to continue discussions among Members concerning the implementation of the notification requirements.

29. The absence of notification may either indicate that the notification requirement is not implemented or that there was actually nothing to notify. These are very different situations. However, each Member should be in a position to know its situation in this respect. An additional element could thus be integrated in the notification mechanism requesting Members to confirm, *e.g.* on an annual basis, whether they have notified all what they consider they had to notify.

30. Members could resort to the possibility (not a requirement) to notify measures of other Members that “affect the operation of the Agreement” (whatever that means), as provided for in Article III:5, which has never been done to date.

31. Some Members may still be facing difficulties to organize a well functioning internal notification process. It may be helpful if Members could, on an informal basis, have opportunities to exchange experience as to the difficulties they are facing, or have been facing, and as to the best means to solve them. Such exchange could be done in the context of the Council for Trade in Services.

32. The Council for Trade in Services could reflect on the situation regarding sectoral services agreements not covered by Article V, in respect of which no notification requirement exist.

33. Many Members have an internet site dedicated to their GATS policy. Such Members may consider adding to their GATS internet page a section containing all their notifications. This would definitely enhance the transparency impact of the GATS notification process and would be of interest for the public.
