

COMMUNICATION FROM SWITZERLAND

GATS 2000: Audio-visual services

The attached communication has been received from the delegation of Switzerland with the request that it be circulated to Members of the Council for Trade in Services. It is without prejudice to Switzerland's specific position as regards individual issues raised therein.

I. INTRODUCTION

1. Switzerland submits this proposal on the basis of the roadmap decided by the Members of the Council for trade in services for the first phase of the negotiations on trade in services in accordance with GATS Article XIX. This communication is meant as an invitation to Members to consider a way forward to the issue of how to treat audio-visual services in the framework of the GATS.

II. DESCRIPTION OF THE SECTOR

2. The audio-visual sector basically covers the production and distribution of audio-visual contents such as motion pictures, radio programmes, television programmes and sound. The digital revolution has modified the way audio-visual contents are created, produced and distributed. In some instances, the so-called convergence has blurred the boundary between the telecommunication and the audio-visual sector. New services are emerging that raise questions as to their relevance for telecommunication, audio-visual and cultural policies. At the same time, they suggest that the present classification may need to be revisited to better take these developments into consideration.

3. The audio-visual sector is a growing market. All available indicators suggest that the activities related to the production and distribution of audio-visual contents tend to account for a growing share of employment, and the output attributable to the sector seems to be growing as well. Furthermore, the audio-visual sector has undergone important structural changes over recent years, mainly induced by technological changes. The digital revolution has led to the development of new content generating processes, which tend to lower the marginal cost of production whilst raising the overall volume of produced and distributed content. The digital revolution has also brought about new distribution channels, based on the use of the Internet.

4. The audio-visual sector has traditionally been heavily regulated in most countries. This is due to the high social, cultural and economic importance of the sector. Such regulatory measures usually concern issues such as public service obligations, subsidisation of content production, diversification of the supply of audio-visual contents, protection from socially harmful content, regulation of advertising through audio-visual channels, access to major events etc.

III. THE TRADE POLICY DEBATE ABOUT THE AUDIO-VISUAL SECTOR

5. Despite the growing economic importance of the sector, the existing commitments in the audio-visual sector under the GATS are very limited. In addition, a great number of Members have taken MFN-exemptions in this sector. This is the result of the configuration of interests during the Uruguay Round on the fundamental issue of how to treat audio-visual services under a trade agreement such as the GATS.

6. During the Uruguay Round, the treatment of audio-visual services had been debated as a “all-or-nothing” issue: according to one view, audio-visual services were to be considered as entertainment products that are in no way different from any other commercial product and had therefore to be submitted to the same trade rules as any other service. The opposite view considered audio-visual products as cultural products, as vectors of the fundamental values and ideas of a society. As such, they are fundamental instruments of social communication and contribute to the cultural identity of a society. Therefore, they cannot be treated as commercial products and need to be excluded from trade disciplines.

7. This debate needs to be overcome if any solution to the issue of the treatment of audio-visual services under the GATS is to be found. In fact, none of these two positions reflects the whole reality. For Switzerland, the audio-visual sector represents both an important field of commercial activity as well as a vector of cultural identity. The challenge for the trade policy consists therefore in reconciling these two views within a balanced solution that satisfies both sensibilities. In that context, Switzerland believes that the public service and its role in the audio-visual sector will need to be in the centre of the debate. A broad discussion needs to take place, that will reveal to what extent the GATS has the necessary flexibility to offer appropriate solutions to the specificity of the audio-visual sector, and to sufficiently take into account the cultural, social and democratic objectives of Members in that sector.

8. The relevant trade statistics suggest that, with foreign market shares of 40% -60% as regards broadcasting and of up to 95% as regards motion pictures - with the exception of the USA - the audio-visual sector is one of the service activities that experiences the greatest foreign penetration. Despite the ideological trade policy debate about audio-visual services, private operators have obviously managed to find a way to live fairly closely together. There is no reason why this reality could not be appropriately translated into trade policy terms without unduly encroaching on Members' competence to pursue their national audio-visual policies.

IV. TRADE-RELEVANT REGULATORY ISSUES IN THE AUDIO-VISUAL SECTOR

9. In an attempt to design a solution to the question of how to treat audio-visual services in a trade policy context, Switzerland wishes to suggest that the individual concerns that Members may have in relation to the regulation of the audio-visual market be taken as a starting point. Such concerns should be discussed with a view to finding a suitable way of dealing with them. Obviously, where such concerns would need to be reflected in the form of reservations to market access or national treatment obligations, concrete solutions would need to emerge from bilateral offer/request negotiations.

10. Before resorting to the bilateral negotiating process, it seems that a number of issues related to the regulation of the audio-visual market deserve to be discussed with a view to elaborating possible multilateral solutions or at least common responses to them. Based on previous discussions on the audio-visual services and on the public debate on this issue, Switzerland wishes to suggest that the following non-exhaustive series of questions be debated:

11. Cultural diversity safeguard: Cultural diversity has emerged over the past few years as a short-cut formula for a public policy objective for the audio-visual sector that enjoys a very broad acceptance. When facing the ambition of achieving a significant level of commitments in the audio-

visual sector under the GATS, Members will need to consider how to ensure that the notion of cultural diversity is sufficiently taken into account. This can be done implicitly by targeting the instruments put in place by Governments to preserve cultural diversity and ensuring that their implementation remains possible, subject to certain disciplines to be developed. This can alternatively, or in addition, be done explicitly through the introduction of a general enabling clause to that same effect. In the latter case, the notion of cultural diversity would probably need to be properly defined, or at least circumscribed, and appropriate safeguards would need to be built-in in order to avoid any abuse. We believe that this question deserves to be thoroughly discussed among Members.

12. Subsidies: General subsidy rules under GATS Article XV are yet to be developed. It is a matter of fact that most WTO Members do subsidise with different intensities the production and distribution of audio-visual products, at least as regards motion pictures. Therefore, in addition to the discussion on general subsidy rules, it would seem to be worth discussing subsidisation practices and their standing under disciplines to be agreed as part of the solution to the audio-visual issue. A common understanding among Members about subsidies, the policy purpose justifying them, as well as their effect on trade, would represent a positive precondition both for the negotiation of specific commitments in the audio-visual sector as well as for the elaboration of general subsidy rules.

13. Public service: Nearly all Members perceive audio-visual services at least partially as services which contribute to the integration and to the identity of a society as well as to the education and to the functioning of democracies. They promote political pluralism and – in the case of Switzerland – “pluri-linguism”, national cohesion and integration. In addition, such audio-visual services should be available at affordable prices to the whole population and/or in a defined territorial area. To that end, Members prescribe different types of measures that reflect their political and social preferences as regards the criteria outlined above. In fact, most Members have established public service organisations and provide them with the necessary funding and access to communication infrastructure. They usually issue prescriptions as regards the contents that such public operators are expected to provide to the public. Switzerland believes that the issue of public service is central to a solution of the audio-visual question under the GATS and therefore deserves to be thoroughly discussed.

14. Illicit content: Some Members have been suggesting that the notion of protection of public morals contained in GATS Article XIV(a) could help finding appropriate solutions to regulatory concerns by Members. Given the wording of that sub-paragraph, it seems that particularly content-related regulations may be concerned by that provision of the GATS. It may seem useful to discuss whether any regulatory concern regarding public moral, such as the protection of minors, would be sufficiently covered by that provision and whether any other regulatory concern related to content exists, that would not be covered by that same provision.

15. Competition issues: the audio-visual sector is characterised by high entry barriers, both as regards the production and the distribution of content. This tendency has even intensified as a result of the IT-revolution and the digitisation of the audio-visual contents. A growing vertical integration across the industry reinforces the fears of anti-competitive behaviours such as abuse of dominant positions. This tendency impacts not only the functioning of the audio-visual market *per se*, but also tends to induce a homogenisation and a levelling of the supply of contents. For these reasons, it seems that the competition dimension of the regulation of the audio-visual sector deserves some discussion.

16. Other regulatory issues: Members could further discuss the relevance and implication of issues such as regulation of publicity and sponsoring, specific transparency requirements for the audio-visual sector, the application of fair and equitable procedures, the issue of the independence of the regulator or any other issue relevant for the audio-visual sector.

17. Market access and national treatment restrictions: Some types of regulatory requirements in the field of audio-visual services - such as diffusion or screen quotas, economic needs test for the

establishment of film theatres, ownership restrictions, nationality or residency requirements etc - are by nature restrictions to the free market access and to the principle of national treatment and as such matters for negotiations. They could therefore be left to the bilateral offer-request process. Bearing in mind that Members are free to maintain such restrictions and to choose whether or not to take specific commitments in respect to them, Switzerland believes however that there would be merit in discussing these regulatory measures. Such discussion could serve to reach a common understanding of their effect both in terms of the regulatory objective to be achieved and of their impeding effect on trade and could thereby facilitate offer-request negotiations.

V. A MULTILATERAL TRADE POLICY FRAMEWORK FOR THE AUDIO-VISUAL SECTOR?

18. At this stage, Switzerland wishes to suggest that the above mentioned issues be discussed within the Special Session of the Council for Trade in Services with a view to clarifying the situation and possibly to identify common views and solutions. This should take place without prejudice to the format that any multilaterally agreed solution might take when it comes to dealing with the audio-visual sector under the GATS.

19. It seems however that possible solutions to the audio-visual issue could take the form of an Annex to the GATS on audio-visual services, or of any other suitable instrument, depending of the nature of the solutions to be elaborated. They could also have implications on the General agreement itself, be it through the addition of a specific provision on audio-visual services, be it by way of interpretation of an existing provision when applied in the audio-visual sector. In any case, the process should permit to distinguish regulatory issues that lend themselves to the elaboration of common provisions, from measures that represent restrictions from market access and/or national treatment and should therefore be listed as reservation in the schedule of specific commitments. The work to be undertaken under the GATS would also need to take into account any relevant development outside the WTO framework on the issue of audio-visual regulation, and cultural diversity in particular.
