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**ASSESSING BARRIERS TO TRADE IN SERVICES**

**THE SCHEDULING OF ECONOMIC NEEDS TESTS IN THE GATS: FOLLOW-UP WORK**

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## ASSESSING BARRIERS TO TRADE IN SERVICES

### THE SCHEDULING OF ECONOMIC NEEDS TESTS IN THE GATS: FOLLOW-UP WORK

1. This paper responds to a request by the Working Party at its 18-19 September 2000 meeting for follow-up work on some specific issues that arose out of TD/TC/WP(2000)11/REV2 - "The scheduling of economic needs test in the GATS: an overview". That paper was declassified in November 2000. Three areas for further enquiry were identified by the Working Party: case studies on the application of economic needs tests (ENTs) in mode 3 for OECD and/or non-Member countries, the compilation of a list of common elements in criteria for ENTs and some exploration of the ways in which ENTs might be made more transparent. Given difficulties in obtaining accurate and up-to-date information as to the existence and operation of ENTs, and resource constraints, the Secretariat was not in a position to be able to respond in a meaningful way to the first request. This fact in itself underlines the importance of further reflection on the other areas identified.

2. The paper is divided into three parts. Section I recalls some of the general issues discussed and problems identified in TD/TC/WP(2000)11 as regards the scheduling and application of ENTs. Section II takes up the central theme in this context - transparency - and considers how transparency may be enhanced. Section III is a list of common elements in criteria for ENTs based on schedule entries in GATS.

#### **I. Introduction**

3. Economic needs tests are referred to, but not defined, in the GATS. The Secretariat uses the following working definition of an ENT: a requirement imposed by a Government - at the national or sub-national level - in order to determine whether or not to allow new service suppliers entry into its market, based on an assessment of "need". An ENT may operate to restrict access for foreign suppliers, or all new suppliers, regardless of origin. As such, they limit competition in the sector to which they are applied. ENTs respond to a range of public policy objectives and are applied in various ways - more or less restrictively, more or less transparently - depending upon the country and the sector. ENTs are predominantly scheduled in mode 3 (commercial presence) and mode 4 (presence of natural persons). In mode 3, ENTs are generally sector specific and are often implemented in social services, such as health (hospital services, distribution of pharmaceutical products, medical services) as well as tourism. Horizontal provisions in country schedules, including investment screening provisions, also may contain ENTs, and as may be the case with sectoral provisions, use of broad, imprecise language may make application of any such ENTs non-transparent. In mode 4, ENTs are generally scheduled as measures applying horizontally (i.e. across sectors). In this context there is often an overlap between domestic (temporary) immigration and labour market policy objectives, as well as sector-specific factors in some cases, whereas the sectoral specificity of mode 3 ENTs suggests that the policy objectives depend upon the market characteristics of individual sectors. ENTs may be used to achieve both economic and social policy objectives.

4. In sectors where WTO Members have scheduled commitments, and in which they maintain measures inconsistent with GATS Article XVI, they are obliged under the GATS to list any such

quantitative limitations in the form of ENTs (or other forms, such as quotas or monopolies) they maintain. These limitations may apply to: (i) the number of service suppliers, (ii) the total value of service transactions or assets, (iii) the total number of service operations or the total quantity of services outputs and (iv) the number of natural persons employed in a given sector or by a given employer.<sup>1</sup> Sixty-seven Members have scheduled measures explicitly identified as ENTs or measures appearing to be in substance economic needs tests.<sup>2</sup>

5. Economic needs tests may constitute significant trade barriers, both in cases where they apply "across the board" to all new suppliers wishing to enter a market, and (especially) where they apply only to foreign suppliers. Such a distinction is not always clear from the entry in Members' schedules. As may be the case with other limitations on market access, barriers lie not just in the measures themselves, but in the lack of transparency surrounding their GATS application: the criteria on which they are based, their scope of application, the way they are administered, the availability of information on changes to criteria, appeal procedures, etc. The combination of these factors can in itself discourage potential suppliers, who may prefer to consider other markets where there is less risk of embarking on a time-consuming and perhaps costly procedure without any guarantee that decisions on "need" will not be taken in an arbitrary, unduly restrictive and/or discriminatory manner.

6. The potentially restrictive effect of ENTs could in some instances be alleviated if these measures were made more transparent, thus making more predictable for potential traders the market conditions in a given country and sector. For example, a schedule entry citing clear criteria and indicating the administering authority would facilitate pre-investment enquiries by a potential supplier, whereas a lack of information, in particular as to time delays and administrative review could discourage from the outset a potential supplier from considering further that particular market. Greater transparency would additionally permit a sort of "stock-taking" or assessment of these barriers, and the relationship between such measures and their policy objectives. This is an essential step towards considering their progressive dismantling or elimination.

## **II. Enhancing transparency**

7. Transparency in government means openness and impartiality of decision-making in the design, enactment, implementation, administration and enforcement of new or amended regulations, laws and administrative practices. It is an ongoing obligation underlying fair and reasonable policy making and regulation. At the multilateral level, the application of transparency disciplines is a key way to provide businesses with more predictable conditions for access to and operation in foreign markets. Transparency in policy-making and implementation permits business, governments and civil society to be better informed and leads to a reduction in the incidence and impact of arbitrary decisions.<sup>3</sup> As such, it reinforces democratic governance and processes. The rationale for insisting upon transparency in WTO agreements lies in the following four objectives: (i) to promote a rules-based approach to trade policy and measures at

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1. GATS, article XVI (2) (a) - (d).

2. Measures that resemble economic needs tests - e.g. "public convenience and needs test", "authorisation...subject to evidence of economic need", "needs test" - appear in numerous schedules. Without further detail as to the application of such measures, it is impossible to know whether or not in substance they are ENTs. For this reason, in TD/TC/WP(2000)11, the Secretariat has included "de facto ENTs" in its analysis, in order to have the most complete picture possible of the incidence of this type of market access limitation.

3. For a discussion of transparency and its role in the multilateral trading system, see "Strengthening regulatory transparency: insights for the GATS from the regulatory reform country reviews", TD/TC/WP(99)43/FINAL.

the national level; (ii) to provide information to foreign traders and investors (iii) to monitor compliance with WTO obligations; and (iv) to facilitate future trade and investment liberalisation. Transparency disciplines are key aspects of WTO agreements, notably the GATT, GATS, TRIPS, and the TBT Agreement.<sup>4</sup>

8. Article III of the GATS provides for the general obligation regarding transparency of measures affecting services trade and investment. It requires Members to publish all relevant measures (i.e. laws, regulations, rules, procedures, decisions and administrative actions) of general application which pertain to trade in services, or make information publicly available.<sup>5</sup> Members must 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 specific commitments in their schedules. Finally, they are required to respond promptly to requests by other Members for specific information on measures and establish enquiry points to do so.<sup>6</sup>

9. The Article III transparency obligations - prompt publication, information provision to other Members upon request, notification of changes, establishment of enquiry points - apply therefore to measures such as economic needs tests. Domestic regulation obligations under GATS article VI are also relevant in this context. While there is no mention of "transparency", several requirements of the article aim to create more transparent domestic regulatory decision-making, implementation, administration and enforcement by introducing obligations of reasonable, objective and impartial administration. There is explicit recognition of the right of service suppliers to information on regulatory and administrative decisions and to judicial and administrative review and appeals processes.<sup>7</sup>

### *Scheduling of economic needs tests*

10. In TD/TC/WP(2000)11/FINAL the Secretariat identified the scheduling of ENTs as an area characterised by a lack of transparency, for several reasons. Firstly, it is not always clear when a measure is an ENT. Many scheduled limitations resemble ENTs: e.g. "public convenience and needs test", "labour market test", "authorisation...subject to evidence of economic need". Other measures seem to involve elements of an ENT: e.g. a condition for entry of temporary workers being a "determination of the non-availability of a person" in the host country. Furthermore, it is often unclear what sort of market need is in question when an ENT is in place; in TD/TC/WP(2000)11 the Secretariat identified two different concepts of "need" in scheduled economic needs tests. In the first case, the need (for foreign suppliers) appears to be determined by the conditions of the particular market: the test is applied by the relevant authority to determine whether an insufficiency of suppliers in the market (thus generally national suppliers) gives rise to a *need* for additional (foreign) suppliers to enter the market. On the other hand, the need for new suppliers in a sector may be predetermined by the governmental authority for the given sector. In that case, a quantitative limit, e.g.  $x$  number of pharmacies is decided to be the appropriate number to meet the needs of  $y$  number of habitants.

11. Economic needs tests based on these two ideas of need reflect different types of social and economic policy objectives. In the first scenario, the ENT that is based on national supply capacities seems

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4. WTO, Working Group on the Interaction between Trade and Competition Policy, *The fundamental WTO principles of national treatment, most-favoured nation treatment and transparency*, WT/WGTCP/W/114, 14 April 1999.

5. Article III (1) and (2).

6. Article III (3) and (4).

7. Article VI (1), (2) and (3).

to be used to ensure that only where national suppliers cannot meet demand, will foreign suppliers be permitted to enter the market. This is not the case in the second scenario, where the need in the ENT is predetermined by a sectoral authority. Unlike in the first case, this sort of ENT applies in theory to all new suppliers, whether of national or foreign origin. Its purpose then seems to be linked to regulating service supply and demand, in order to avoid undesirable social and/or economic consequences that may otherwise arise. For example, an excessive number of hospitals for a given population in a given area would be an inefficient use of resources, resulting, for instance, in eventual unemployment, misuse of public land, etc. On the other hand, policies to protect national operators from competition from foreign suppliers, to permit the “phasing-in” of foreign workers, or to combat unemployment by allowing foreign workers entry only when local workers are unavailable, may underlie the first type of ENT.

12. Given these significant differences in purpose, a first step towards enhancing transparency in this area would be working towards a common understanding of what an economic needs test is. This could take the form of an informal understanding, or be integrated into the scheduling guidelines. Ideally, measures that are in effect ENTs should clearly be designated as such, and the economic need that the test aims to assess should clearly be specified. This would go some way to permitting potential service traders to know what in practice an ENT entry may represent. Members would of course retain the freedom to maintain limitations, that may or may not correspond to any generally agreed definition of a particular measure.

13. Once the definition of the measure is clarified, the same logic could be extended to its scope. While for mode 3 ENTs, which are usually sector specific, the scope of the measure may be relatively clear, the same does not always apply to mode 4 measures, given that the majority of them apply at the horizontal level. Many mode 4 ENTs apply to "specialist personnel", while highly qualified professionals, "managers", "executives" and "intra-corporate transferees" are also mentioned often. "Specialist" is an example of one commonly used term, for which a common understanding of definition is not always apparent. The use of the broad category covered by “specialist” may respond to the lack of precision in the GATS as to service occupations and the resulting difficulty in terms of domestic labour policy to protect a given occupational category from foreign suppliers. The response at national level has often been to take a restrictive approach to “specialists” when making mode 4 commitments in order to cover the undefined number of occupational categories that could be involved in service supply by a temporary worker in a given sector.<sup>8</sup>

14. One possible solution to this problem is the use of an agreed occupations list, such as the ILO’s International Standard Classification of Occupations (ISOC) to bring some precision to the application of mode 4 ENTs.<sup>9</sup> The ILO Classification is based upon nine broad groupings of occupations, subdivided into major, minor and unit categories. This approach would have the advantage of enhancing transparency and permitting easy comparison between Members, and better assessment of the impact of ENTs, but only if

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8. Young, A, in Sauvé, P., and Stern, R., eds (2000), *GATS 2000: New Directions in Services Trade Liberalization*, Washington, D.C.: The Brookings Institution Press.

9. This approach, originally put forward by UNCTAD, was canvassed in TD/TC/WP(2000)11 as one possible way to reduce ENT-related barriers in mode 4, and is also discussed in the context of enhancing transparency in mode 4 scheduling by Allison Young in Sauvé, P., and Stern, R., eds (2000), *GATS 2000: New Directions in Services Trade Liberalization*, Washington, D.C.: The Brookings Institution Press. See also the following UNCTAD documents: *Scope for expanding exports of developing countries in specific services sectors through all GATS modes of supply, taking into account their interrelationship, the role of information technology and of new business practice* (1998), TD/B/COM.1/21; *Analysis of experiences in selected service sectors* (1999), TD/B/COM.1/28; *Assessment of trade in services of developing countries: summary of findings* (1999), ITCD/TSB/7 and *Lists of Economic needs tests in the GATS schedules of specific commitments* (1999), ITCD/TSB/8.

Members were to agree on the same occupations classification. This condition may not always be easy to fulfill, given the diversity of national temporary entry regimes.

15. Once the basic definitional issues are clarified, a similar approach could be useful for the criteria upon which ENTs are based. This point is already dealt with by the GATS scheduling guidelines, which require that entries of ENTs “should indicate the main criteria on which the test is based”.<sup>10</sup> In order to facilitate compliance with the guidelines, a standard form could be developed. Given that for mode 3, ENTs are for the most part sector-specific, such a standard form could be developed by sector. Again, this approach does not oblige Members to adopt their measures to fit a model, nor does it imply an agreed set of criteria. Rather, it provides a non-legally binding structure or guide for the scheduling of measures to encourage consistency between schedules and greater clarity. It does not prevent variations or particularities from being maintained, but attempts to provide a framework so that the scheduling of measures is made more commercially meaningful.

### *Notification of changes*

16. Transparency problems concerning ENTs are not limited to the way in which they are scheduled. Market conditions and policies change; traders and investors need to be able to have access to reliable and up-to-date information about the regulations applying in particular sectors. In terms of limitations such as ENTs, potential suppliers need to be able to form an idea of how the test is applied, how long the procedure may be and how costly, and even before these considerations, whether or not it is still in place and whether the criteria scheduled are still the same. As mentioned above, GATS article III requires Members to notify the Council for Trade in Services of any new or any changes to existing laws, regulations and administrative guidelines that significantly affect services trade covered by commitments in their schedules. Article III also requires publication of all relevant measures of general application. The following considers some ways in which these disciplines could be made more effective, thus rendering ENTs more transparent.

17. One approach to making ENTs more easily understandable is to apply the idea of a standardised form discussed in the scheduling context, that Members could use if they wished when notifying changes to existing laws and the introduction of new laws relating to ENTs. A standard “minimum” set of information could be envisaged. This could include elements such as criteria,<sup>11</sup> duration of the measure, details as to relevant administrative procedures, including explanation of decisions, review of applications, and review of the need to maintain the measure in question. In addition, transparency in this context could significantly be enhanced by requiring Members to include in their notification the economic or social policy objective sought to be achieved by the measure. This would encourage Members to reflect upon whether or not the objective could be served by other, less trade-restrictive measures, and also permits potential suppliers to be able to gauge better the regulatory and political environment of the sector in which the ENT applies. Standardised forms also allow comparability among Members, which can lead to reducing barriers by sharing “best practices”.

18. Taking this reasoning one step further, a notification procedure for scheduled ENTs - in addition to existing notification obligations regarding changes and new laws - could be envisaged. This could serve to provide detail and up-to-date information as a supplement to the measure and basic detail for criteria scheduled. In that case, a scheduling standard form would include the measure and criteria, and the

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10. MTN.GNS/W/164/Add.1, paragraph 3.

11. E.g. Where population criteria is listed, an indication of the quantitative limit in force - the number of suppliers determined to be appropriate to meet the needs of the population at the time the ENT is scheduled - could be required.

notification standard form would contain additional information, pertaining to, for example, procedures and costs, which may be updated or amended from time to time. This approach would have the advantage of keeping scheduling of commitments as transparent as possible without being too onerous and allowing other information subject to modification to be provided through the notification process. The following are hypothetical examples of the sort of information that could be required in these standard forms. Box 1 contains an example of a standard scheduling form that covers basic information about the measure, including an entry of “other requirements” for other relevant information. Again, these would be non-binding forms that Members would be encouraged to use in the interests of consistency and greater scheduling clarity.

**Box 1. Hypothetical schedule entry - Member X**

*Sector:* tourism services (opening of new bars)

*Mode:* 3

*Market Access limitation:* ENT

*Criteria:* population criteria, i.e. the number of bars already operating in the region.

*Other requirements:* licence issued to companies with at least 30% capital owned by nationals of Member X; authorisation may be refused to protect areas of historical interest.

*Administering authority:* Department of Tourism.

*Review:* licence decisions may be reviewed by the Tourism Development Body.

**Box 2. Hypothetical notification - Member X**

*Sector:* tourism services (opening of new bars)

*Mode:* 3

*Market Access limitation:* ENT

*Criteria:* population criteria, i.e. the number of bars already operating in the region. Currently 1 bar per 50 inhabitants authorised per region; current number of bars: region A: 2 licences available; region B: no licences available; region C: 5 licences available.

*Other requirements:* licence issued to companies with at least 30% capital owned by nationals of Member X; authorisation may be refused to protect areas of historical interest.

*Duration of measure:* subject to periodic review (at least once every five years).

*Policy objective:* to maintain an appropriate number of bars.

*Administering authority:* Department of Tourism.

*Procedure:* application for licence with Ministry of Tourism (address or website).

*Approximate processing time:* 3 months.

*Review:* licence decisions may be reviewed by the Tourism Development Body. The reviewing body will provide reasons for unfavourable decisions in writing upon request.

*Cost:* \$US 230 per application; \$US 100 for review.

19. One option for mode 4 ENTs, given the importance of this mode for developing countries and the significance of ENTs as a potential barrier to mode 4 trade, would be to develop ENT information services in article IV obligations. This article requires Members to establish “contact points” to facilitate access of developing countries to relevant market information.

### III. Common elements in ENT criteria

20. The majority of ENT entries in schedules do not include the criteria upon which the ENT is based and where criteria are indicated, there is often a lack of detail. Some elements of criteria do reoccur however. The following two tables list common elements in criteria that are scheduled, starting with those that are scheduled the most often (darker shading), by mode. Two columns are included for each table, the first being for measures that are unambiguously ENTs, and the second for measures that are ENT-like in effect. As the tables show, this distinction has little bearing on the criteria listed: for both types of measures the same criteria tend to appear. For mode 3, the criteria appearing the most often is the examination adequacy of current levels of service in the particular market and "population criteria"; for mode 4, the criterion appearing the most often is that of the availability of similar workers in the host country.

## MODE 3 ENTs - CRITERIA

ENTs	"de facto ENTs"
Examination of adequacy of current levels of service/ Shortage of suppliers in a given area/ Number of existing suppliers <sup>12</sup>	<i>Examination of adequacy of current levels of service/ Shortage of suppliers in a given area/ Number of existing suppliers<sup>13</sup></i>
Population criteria <sup>14</sup>	<i>Population criteria<sup>15</sup></i>
Existence of surplus demand to avoid harmful competition to the market or financial positions of existing companies/ market conditions establishing the requirement for expanded services/ market needs <sup>16</sup>	<i>Existence of surplus demand to avoid harmful competition to the market or financial positions of existing companies/ market conditions establishing the requirement for expanded services/ market needs<sup>17</sup></i>
Examination of the effect of new entrants on public convenience/ Applicant must undertake to ensure proper functioning and stability of market and serve the national interest <sup>18</sup>	<i>Examination of the effect of new entrants on public convenience/ Applicant must undertake to ensure proper functioning and stability of market and serve the national interest<sup>19</sup></i>
Traffic criterion/ ENT based on existing public transport on route concerned/ Capacity test for number of vehicles, need to provide protection to operators in unserved areas or developmental routes <sup>20</sup>	

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12. Canada (courier services); European Communities (D) (medical, dental and midwives services); European Communities (E, I) (supply of pharmaceutical goods to the public); European Communities (E) (hospital services), European Communities (road transport services).
  13. Canada (retail distribution services, rental services, highway freight transportation, inter-urban transport and scheduled bus services); European Communities (E) (security services); Switzerland (tourism services).
  14. Czech Republic (tourism services); (European Communities) (E,I) (supply of pharmaceutical goods to the general public); European Communities (NL, E) (hospital services).
  15. European Communities (F) (supply of pharmaceutical goods to the general public, wholesale pharmacies); European Communities (B) (hospital services); European Communities (I) (hospital services); Switzerland (tourism services).
  16. Canada (courier services); Egypt (tourism services, financial services).
  17. Argentina (telecommunications services), Canada (retail distribution services, rental services of cars with drivers, highway freight transportation, inter-urban bus transport and scheduled services).
  18. Canada (courier services).
  19. Canada (retail distribution services, rental services of cars with drivers, highway freight transportation, inter-urban bus transport and scheduled services), Chile (financial services).
  20. European Communities (I, E, IRL, DK) (road transport services); Norway (road transport services); Philippines (transport services).

**MODE 4 ENTs - CRITERIA**

ENTs	"de facto ENTs"
Availability of similar professionals, technicians, managers in the host country/regional vacancies and shortages <sup>21</sup>	<i>Availability of similar professionals, technicians, managers in the host country/regional vacancies and shortages<sup>22</sup></i>
Qualifications, experience, suitability for position <sup>23</sup>	<i>Qualifications, experience, suitability for position<sup>24</sup></i>
	<i>Managerial needs, including employment creation/ Employment conditions including no adverse effects on working conditions of similarly employed; no displacement of national workers within specified timeframes; employer taking steps to recruit and retain sufficient national workers in the occupation, etc.<sup>25</sup></i>

21. As these lists of scheduled criteria show, there appear to be many similarities between measures maintained by Members. This lends support to the idea of working towards a common understanding of the measure, and also the utility of a standard form for scheduling and notification purposes. Even so, comparability between measures and transparency are somewhat hampered by the very general nature of these common elements. While it may be clear that "population criteria" is a criterion of many mode 3 ENTs, the term may be overly vague to add much meaning to an ENT schedule entry. For this reason, an effective solution may be, as discussed above, to require a minimum amount of detail as to such criteria in scheduling and more (and up-to-date) detail and information through periodical notification.

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21. European Communities (I).

22. Brazil, Chile, European Communities (F), Philippines.

23. New Zealand.

24. Brazil, European Communities (F), Philippines, Thailand.

25. Thailand, US