

# WORLD TRADE ORGANIZATION

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Council for Trade in Services

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## COMMUNICATION FROM THE EUROPEAN COMMUNITIES

### Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of the Accession of the People's Republic of China ("China")

The following communication, dated 9 October 2009, from the delegation of the European Communities, is being circulated to the Members of the Council for Trade in Services.

1. The EC would like to transmit, in advance of the meeting of the Council for Trade in Services, the following questions and comments on the implementation by China of the GATS agreement, its commitments listed in the Schedule of Specific Commitments and of related provisions of its Accession Protocol.

2. In order to ensure effective review of the implementation by China of its commitments, the EC requests China to provide responses and relevant information to the following questions in advance of the meeting of the Council for Trade in Services in accordance with the paragraph 18 of the Protocol of Accession of China.

3. The EC reserves its right to raise additional questions, upon receipt of responses to its questions and comments by China, in accordance with paragraph 8 and paragraph IV.3 (a) of Annex 1A of the Protocol of Accession of China.

#### **I. AIR TRANSPORT SERVICES**

4. In the GATS Schedule accompanying its Protocol of Accession, China made commitments under GATS Article XVI and Article XVII for Mode 1 on Computer Reservation Systems (CRS).

5. On 5 December 2008, the Council for Trade in Services addressed the annual review of the implementation by China of the WTO Agreement. On that occasion, China reported that the Regulation on Computer Reservation Systems was under preparation and hence it was not possible to address the specific questions presented by EC.

6. During the 2008 annual review, China stated that (see S/C/M/92/) "foreign airlines could use CRS to sell or reserve tickets for customers after their appointed Chinese agents were approved by the CAAC. According to the CAAC, there was no information about approved agents failing to use foreign CRS services." However, China has not approved foreign CRS so that they can join China's Billing and Settlement Plan (BSP) and hence Chinese agents approved by CAAC in accordance with *Provisional Administrative Measures on the Usage of Computer (Passenger) Reservation System by Air Transport Enterprises and their Sales Agents within the Territory of China* (CAAC, 1995, No. 51) are unable to sell tickets using foreign CRS. Could China explain:

- (a) Whether and based on which legislation, foreign CRS are required to get a special approval before they can participate in China's BSP;
- (b) Which legislation implements the authorisation and approval requirements listed in items 298, 301, 360, 361 and 362 of the *Decision of the State Council on Establishing Administrative Permission for the Administrative Examination and Approval of Items Necessary to be Retained (Order of the State Council 412, 29 June 2004)*.
- (c) Based on which legislation or approval, the only local CRS provider TravelSky is operating and is allowed to participate in China's BSP;
- (d) How this is in compliance with Chinese commitments on CRS services, in particular commitments on national treatment?

7. In addition, foreign airlines have submitted applications for the use of foreign CRS by their designated travel agents in accordance with Provisional Administrative Measures on the Use of Computer Passenger Reservation System by Foreign Air Transportation Enterprises and Their Sales Agents in China (Regulation 51/1995). These applications have not been approved or refused despite Regulation 51/1995 setting a time limit of sixty (60) days. Requests for information about the status of these applications have also been ignored, including during the annual review in CTS in 2008.

8. The EC wishes to point out that both problems have been brought to the attention of China on several occasions, inter alia in the questions raised in the annual review in 2008 as well as at highest political level in the EU-China High Level Economic Dialogue in April 2009.

9. With this in mind, the EC requests China to give an update on the progress of drafting the new regulation, in particular its scope, the timeframe for its approval and entry into force. The EC reminds China that China did not list any transitional periods for CRS services and that China specifically committed upon accession not to enforce any laws and regulations affecting trade in services unless they are published and readily available to other WTO Members. Also upon accession, China undertook to publish all of China's licensing procedures and conditions.

10. As regards the draft regulation, the EC requests further information on the content of the draft regulation. In particular, could China please:

- (a) Describe the scope of activities covered and subject regulated (local CRS providers, foreign CRS providers, Chinese travel agents, foreign and Chinese Aviation Enterprises) under the draft new Regulation;
- (b) Describe whether and how the draft new regulation will modify the conditions of access and operation for foreign CRS providers to China's CRS market;
- (c) Confirm that the draft Regulation foresees possibilities for direct access to and use of foreign CSR by Chinese travel agents;
- (d) Confirm if a licensing procedure will apply to foreign CRS providers, including with regard to participation and use of BSP, and, in the affirmative, describe the licensing procedure, notably any conditions required to obtain a licence;
- (e) Confirm if a licensing procedure will apply to local CRS providers, including with regard to participation and use of BSP, and, in the affirmative, describe the licensing procedure, notably any conditions required to obtain a licence;

- (f) Confirm if a licensing procedure will apply to Chinese travel agents, including for issuing tickets, and describe the licensing procedure, notably any conditions required to obtain a licence.

## II. CONSTRUCTION SERVICES

11. In the GATS Schedule accompanying its Protocol of Accession, China made commitments under GATS Article XVI and Article XVII for Mode 3 with regard to the construction sector. The EC would welcome clarifications on the implementation of these commitments in a number of areas.

12. The implementing rules of the Decree 114 include measures which are temporary:

- (a) The possibility to use "temporarily" Chinese registered architects or engineers where relevant foreign professionals also qualified in China cannot be found;
- (b) The 6-month residency requirement may not be applied where foreign architects or engineers cannot "temporarily" satisfy it.

13. The EC requests clarification about when China intends to issue permanent implementing rules which would provide more legal certainty than temporary measures.

14. The EC requests clarification on the fact that China's GATS commitments in construction services do not include specific limitations on the number of foreign professional staff for foreign-invested enterprises or residency requirements, while Decree 114 foresees such requirements.

15. China's GATS commitments in construction services do not mention any limitation as regards national treatment in Mode 3. However, Notice No 73 on foreign personnel of construction enterprises foresees a residency requirement of three-month per year. This was not removed by Circular 159. The EC would like to know when China intends to abolish these residency requirements.

16. High capital requirements put an unnecessary burden on companies and could be replaced by more market oriented instruments. The EC would like to know whether China is considering relaxing the registered capital and net assets requirements and replacing them with alternative financial instruments, such as letters of guarantees, insurance bonds or bank guarantees.

## III. DISTRIBUTION SERVICES

17. In the GATS Schedule accompanying its Protocol of Accession, China made commitments under GATS Article XVI and Article XVII for Mode 3 with regard to distribution services. The EC would welcome clarifications on the implementation of these commitments in a number of areas.

18. As regards the distribution of refined oil products in China, this is regulated by *Measures for the Administration of the Refined Oil Market* (Order of the Ministry of Commerce No.23 [2006]) and the *Notice on Relevant Issues about the Business Operation of the Private Enterprises of Refined Oil Products* (No. 602 [2008] of the National Development and Reform Commission).

19. However, the Order [23] 2006 did not mention repealing the *Opinion Rectifying Small Refineries and Standardizing Distribution of Crude Oil and Oil Products by the State Economic and Trade Commission & Related Authorities* (State Council, Guobanfa No.38 [1999]). The [38] 1999 foresees concentration of wholesale through two incumbents. In this regard, the EC requests China to confirm that the Opinion Guobanfa No.38 [1999] is not in force anymore.

20. The criteria in the Order No 23 [2006] on Administration of the Refined Oil Market require long-term and stable supply of refined oil to both wholesalers and retailers. In case of wholesalers this can be achieved through owning a refinery, being an importer or having a long-term contract with a qualified importer or wholesaler. In this respect, could China please:

- (a) Inform the EC how many qualified non-state-owned importers and how many qualified non-state-owned wholesalers, including foreign invested are there;
- (b) Clarify the areas, if any, in which Chinese state-trading enterprises enjoy monopoly rights;
- (c) Describe what measures has China put in place to ensure that the state-trading enterprises of refined oil who are in direct competition with foreign wholesale and retail providers on all levels of distribution chain respect China's obligations under Article VIII of the GATS, in particular to ensure that the state-trading enterprises do not abuse their position to act in a manner inconsistent with China's distribution commitments, in particular:
  - (i) do not refuse or unduly delay entrance into contractual obligations for long-term supply with foreign invested wholesale or retail companies;
  - (ii) do not hinder in a joint-venture with majority ownership by either of the Chinese state-owned incumbents the application for wholesale licences in order to limit competition on the market;
  - (iii) comply with Chinese legislation, in particular the profit margins for retailers as defined in the *Notice of NDRC on Relevant Issues about the Business Operation of the Private Enterprises of Refined Oil Products* ( No [602] 2008).
- (d) Inform the EC what measures has China put in place, if any, for out-of-court redress in case of complaints by foreign invested companies related to abuse of dominant position by state-owned enterprises.

21. As regards distribution of pharmaceutical products in China, China has taken (by 2008) full commitments on wholesale and commission agents services and limited commitments on retail services, and full commitments for selling products manufactured in China. The EC understands that foreign invested companies who wish to wholesale and retail pharmaceutical products produced by affiliates outside China need to get approval from Ministry of Commerce and also the State Food and Drug Administration (SFDA). Could China please:

- (a) Clarify if a separate legal entity has to be created to import and distribute pharmaceuticals produced by affiliates outside of China;
- (b) Clarify in which legal act this has been established;
- (c) Clarify in which order the application has to be submitted to these authorities for approval;
- (d) Clarify if wholesaler are allowed to outsource the warehousing of the imported goods and if not, whether China has considered introducing such a possibility;

22. As regards retailing services via Internet (e-commerce), in the Transitional Review of 2008, China stated (S/C/M/92) that the required ICP license for distribution over internet is non-discriminatory and serves the interest of consumer protection. However, the conditions for an ICP licence require establishment of a telecommunication enterprise as well as telecommunication sector-specific knowledge and experience. Companies providing retailing services, either at fixed locations or over internet do not have telecommunication knowhow and experience and are hence effectively put out of market. In this regards, the EC would welcome an explanation why a telecommunication licence is required for provision of distribution services and whether China has considered replacing it with a specific authorisation procedure for provision of distribution services via Internet (e-commerce) that is not require telecommunication related experience.

#### **IV. POSTAL & COURIER SERVICES, INCLUDING EXPRESS DELIVERY SERVICES**

23. In the GATS Schedule accompanying its Protocol of Accession, China made commitments under GATS Article XVI and Article XVII with regard to courier services. The EC would welcome clarifications on the implementation of these commitments in a number of areas.

24. The new Postal Law of PRC was adopted on 24 April 2009 and entered into force on 1 October 2009.

25. The EC request clarification on number of issues the new law raises:

- (a) The Schedule of Specific Commitments on Trade in Services of China specifies the scope of commitments applying to all courier services that were not reserved at the time of accession. When China joined the WTO, according to information available to the EC, China permitted foreign companies to provide domestic express delivery services under government issued licenses, with only a narrowly defined limitation on the delivery of private letters that was reserved to China Post. However, Article 51 of the new Postal Law stipulates that foreign businesses are forbidden to invest in or operate domestic express delivery of letter articles. Article 84 defines "letter articles" as "information carrying materials in an envelope style covering sealed deliveries to a specific person or unit according to a name and address not including books, newspapers, periodicals etc". Thus the delivery of commercial documents is not allowed to foreign invested express delivery companies under the new law. Therefore the new law constitutes a limitation which is more restrictive than the reserved area at the time of accession. Can China explain how this is in conformity with its GATS commitments?
- (b) In addition, the definition in Article 84 as referred above raises an important question as regards documents delivered with e.g. parcels or goods shipments, such as an attached invoice, instruction manual, explanatory note, which are an integral part of such deliveries and should not fall under the limitation concerning the delivery of letter articles. Could China confirm that the delivery of such documents, incidental to express delivery of parcels, goods shipments etc do not fall under the limitation of Article 51 and are not considered to constitute "letter articles" as defined under Article 84?
- (c) The new Postal Law entered into force 01. October 2009. However, several implementation acts are still not in place. The EC request China to provide a clear time-frame of when these measures, in particular measures relating to definition of postal monopoly will enter into force? In addition could China clarify how it intends to define the postal monopoly?

## V. REAL ESTATE SERVICES

26. In the GATS Schedule accompanying its Protocol of Accession, China made commitments under GATS Article XVI and Article XVII for Mode 1 and Mode 3 with regard to real estate services, without any limitations on national treatment. The EC would welcome clarifications on the implementation of these commitments in a number of areas.

27. The *Notice on Issuance of the List of the First Batch of Foreign Investment Real Estate Projects* of July 10, 2007 issued by the State Administration of Foreign Exchange (SAFE) together with the *Notice of the Ministry of Commerce and SAFE on Further Strengthening and Regulating the Examination, Approval and Supervision of Foreign Direct Investment in Real Estate Industry* of 23 May 2007 seems to create barriers for foreign invested real estate businesses in conjunction with circulars 171, 130 and 50. In particular, the Circular 171 requires foreign invested enterprises to establish in China and increases the debt-equity ratio for foreign real-estate investors from 2:1 to 1:1. Furthermore Circular 130 completely forbids the use of foreign debt in Chinese property development. In this regard, the EC request China to

- (a) Confirm that FIEs are subject to different rules on real estate services, in particular on debt-equity ratio, and explain how this is in compliance with China's commitments;
- (b) Explain the reasons for the ban on foreign debt use in Chinese property development and how this is in compliance with China's mode 2 commitments under banking services?

## VI. TELECOMMUNICATIONS

28. In the GATS Schedule accompanying its Protocol of Accession, China made commitments under GATS Article XVI and Article XVII for Mode 3 with regard to telecommunication services. The EC would welcome clarifications on the implementation of these commitments in a number of areas.

29. On 5 December 2008, the Council for Trade in Services addressed the annual review of the implementation by China of the WTO Agreement. On this occasion the EC raised a number of questions with regard to telecommunication services, but did not receive responses to all questions.

30. As regards basic telecommunication services, the EC requests China to:

- (a) Confirm that China does not maintain a requirement for foreign investors to choose a Chinese joint-venture partner from the basic telecommunication sector, in accordance with paragraph 314 of the Working Party report?
- (b) Provide information on how many foreign invested joint-ventures have been created with non-telecoms partners?
- (c) Confirm that until present there is no single example of a foreign invested equity joint venture providing mobile or fixed services in China?

31. As regards value added telecommunication services, could China please:

- (a) Describe which measures it has taken in order to address the problems encountered by foreign companies entering the VAS market, in particular as regards the transparency of applicable procedures?

- (b) Could China please provide up to date information on the number of
  - (i) applicants and approved foreign invested telecommunications enterprises;
  - (ii) applicants and VAS licenses granted for FITE?

32. Can China provide the EC with specific information on the organisation (staffing, powers vested) of its regulatory authority responsible for telecommunications and especially, on the requirements guaranteeing the independence of its regulator?

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