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Council for Trade in Services

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COMMUNICATION FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

TRM China - Trade in Services

The attached communication has been received from the delegation of the European Communities and their Member States with the request that it be distributed to Members of the Council for Trade in Services.

1. The European Communities and their Member States are transmitting comments and questions in advance of the October meeting of the Council for Trade in Services in order to give time for the Chinese authorities to provide the relevant information including information specified in Annex 1A of the Accession Protocol. We would like to underline that these comments and questions are based on information obtained indirectly.

2. China has begun to pursue market-opening measures in line with the obligations of WTO membership. Our comments and questions on this process are best discussed under the following headings: transparency, transposition into domestic legislation, unexpected difficulties and success stories. They cover postal services, financial services, telecommunications, transport and professional services.

3. Most new legislation affecting trade in services contains an excessive number of unclear or ambiguous provisions. This might result from insufficient regulating experience, from undecided objectives for the sector, or from a deliberate strategy. It is also possible that more detailed regulations will be passed in the near future. The fact is that too often the strict wording of the texts allows wide discretion to Regulators to implement WTO provisions or not.

I. POSTAL SERVICES

A. UNEXPECTED DIFFICULTIES

4. In the express/courier sector, we are concerned about two new regulations (notices 629 and 64) adopted respectively by China in December 2001 and February 2002. In their present form, these regulations would compel express operators to a very burdensome entrustment procedure and considerably restrict their scope of activities. They appear to contradict China's previous commitments, both horizontal and sector-specific, to the WTO. In our last information, the deadline for the entrustment procedure has been postponed, thus allowing express operators to continue temporarily their activities. In the light of this information, we would like:

- **To seek confirmation that China will implement its WTO commitments;**

- **To have a confirmation of the fact that the deadline for entrustment has been postponed. If so, until which date?**
- **To know what steps the Chinese authorities now intend to take in order to solve the problem.**

II. FINANCIAL SERVICES

5. Please refer to the comments and questions sent on insurance, banking and securities services to the Committee on Trade in Financial Services (S/FIN/W/18).

III. TELECOMMUNICATIONS

A. TRANSPARENCY AND TRANSPOSITION

6. Telecommunications is another sector where further transparency would be necessary. The EC acknowledges that some administrative texts have been adopted in September 2000 and December 2001 for the regulation of the sector and the regulation of foreign-invested companies in this sector. The EC regrets that there was no public consultation on either of these texts, in particular because these texts raise questions vis-à-vis the commitments made by China in the WTO. Additionally, these texts leave a fair number of questions open. Notably, those texts leave uncertainties on the administrations involved in the regulation of the sector at the national and the provincial level, and what their respective duties are. The procedures for application for licences are not public either.

- **The EC would thus be grateful for clarifications on these issues and other issues mentioned in the list of issues annexed to this document.**

IV. TRANSPORT

A. TRANSPARENCY AND TRANSPOSITION

7. China has issued regulations on international maritime transport in December 2001 and draft of rules implementing the regulations in June 2002. The regulations and the rules specify how certain activities in the transport sector are regulated, and also relate to the licensing procedures for companies engaged in maritime transport services and more general auxiliary transport services such as freight forwarding.

- **Could China clarify the present status of the rules, and describe how the further implementation is expected to proceed (in particular in relation to licensing and establishment of branches)? Also, could China clarify the distinctions applied in the rules between the companies operating ships, and the companies engaged in freight forwarding and other auxiliary activities?**

V. LEGAL SERVICES

A. TRANSPARENCY

8. As part of its accession to the WTO, China committed to provide a reasonable period for comment before trade-related measures –including measures pertaining to trade in services- are implemented (See Protocol of Accession, Section 2(C)2).

9. In late December 2001, China promulgated the Regulations on the Management of Representative Offices of Foreign Law Firms in China (hereafter “the Management Regulation”) and

no comment period was provided prior to the Regulations becoming effective. The situation has been reproduced with regard to the implementing rules adopted in summer 2002.

- **Could China explain why the Regulation and its implementation rules have been adopted through accelerated procedures? Why wasn't there any comment period provided prior to the Regulations becoming effective?**

B. TRANSPOSITION. UNEXPECTED DIFFICULTIES

1. **Re-registration**

10. All licences that were operational at the date of China's accession to the WTO are covered by the "grandfathering" horizontal commitment made by China, according to which the conditions of ownership, operation and scope of activities, as set out in their respective contractual or shareholder agreement or in a licence establishing or authorising the operation or supply of services by an existing service supplier, will not be made more restrictive than they exist as of the date of accession. Furthermore, in the area of legal services, China's schedule of commitments does not contain national treatment restrictions concerning licensing procedures.

11. According to one supplementary provision of the Management Regulation, representative offices of foreign law offices operating on a trial basis and their representatives had to apply again for examination and approval procedures according to the new rules within 90 days of the date the Regulation takes effect.

- **Could China explain why, in spite of the referred horizontal commitment, it was necessary to complete a re-registration process within such short deadlines?**

2. **Opening of offices**

12. China committed to permit, in certain geographical areas, a number of representative offices of foreign law firms not inferior to that existing upon the date of accession (i.e. by December 11, 2002). It also committed to lift limitations on where offices can be established (geographic limitations) and the number of offices that can be established in China (quantitative limitations) within one year of accession.

13. The Management Regulation has established, as a condition for foreign laws applying to establish a representative office, to possess the need of that establishment to start legal service operations. The implementing rules have indicated the factors used for the identification of such a need by the Ministry of Justice.

- **Has China decided to establish an economic needs test which has not been listed in its schedule of commitments?**

14. The implementing rules have also established conditions for the establishment of any additional representative office (in particular that the representative office most recently established in China has practised for three consecutive years).

- **Will these conditions only apply before December 11, 2002? If they apply after that date, could China explain why it is introducing quantitative restrictions through this requirement?**

3. Examination of applications

15. China's WTO Working Party Report (in paragraph 308 (f)) states that for those services included in China's Services Schedule, "Decisions would be taken promptly on applications".

16. The implementing rules allow the relevant authorities a total of six months to consider applications for the establishment of representative offices.

- **Taking into account the comparable period for approval of establishment of Chinese law firms (30 days), could China explain why such a long period for examination is required?**

4. Information on the impact of the Chinese legal environment

17. According to China's commitments, representative offices of foreign law firms can provide information on the impact of the Chinese legal environment. China has explicitly excluded from its commitments the practice of Chinese law and the employment of Chinese national registered lawyers. The meaning of this term was clarified in the Working Party report (paragraph 319), as "Chinese nationals who had obtained a lawyer's certificate and were holding a Chinese practising permit and were registered to practice in a Chinese law firm". Co-operation between representative offices and Chinese law firms and lawyers is not explicitly prohibited by the Services schedule and should be allowed in so far the practice of Chinese law is left to the Chinese law firm engaged into such co-operation.

18. When defining practice of Chinese law, the Management Regulation and the implementing rules have adopted a very broad definition of legal services, which would include activities not covered under CPC 861. For the definition of information on the impact of the Chinese legal environment, they give a very restrictive interpretation by which specific opinions or determination on the application of PRC law may not be provided. They have also imposed severe restrictions on the development of ties with Chinese law firms or lawyers.

- **Could China explain the reasons for further restricting the already very limited scope of activities granted to representative offices in the Services Schedule?**

5. Specific regulations for China's bonded tariff zones

19. In accordance with Article II.1 of GATS, China may not treat legal services or legal service providers of some WTO Members less favourably than it treats like services or services suppliers of other WTO Members.

20. The Management Regulation contemplates separate rules for the establishment and management of representative offices by law firms of China's bonded tariff zones. Administrative Regulations on representative offices of Hong Kong and Macao law firms in Mainland China were adopted on February 20, 2002, and entered into force on April 1, 2002.

- **Could China confirm that any advantage granted or to be granted in the future to foreign offices of Hong Kong and Macao will be automatically extended to foreign offices of law firms from all WTO Members?**

VI. OTHER PROFESSIONAL SERVICES

A. TRANSPARENCY AND TRANSPOSITION

21. China commitments cover also the following sub-sectors: accounting, auditing and bookkeeping services, taxation services, architectural services, engineering and integrated engineering services, urban planning services and medical and dental services. For some of them, the level of commitments is to increase at the end of transitional periods.

- **Could China provide information on the relevant legislation applicable to those sub-sectors?**

ANNEX

List of Issues on the Chinese Telecommunications Regulatory Framework

I. GENERAL

1. What are the relevant sector-specific legal texts for the telecom sector? We are aware of State Orders 291 and 292 of September 2000, and the regulation on foreign invested enterprises of 21 December, 2001.
2. Will there be other texts?
3. Is it correct to state that these texts lay out the rules for services consisting of the transmission of any electromagnetic signals, including broadcasting?
4. What are the existing appeal procedures for the application of these texts?
5. Is there always a public consultation of operators and other stakeholders when a new regulation is adopted? For instance Order 291 mentions public hearings for setting up government-oriented or fixed prices.

II. REGULATORY AUTHORITIES

6. State order 291 talks about “The information industry authority under the State Council” which we understand is the Ministry of Information Industries. It also mentions “telecommunications administration at a level of province, autonomous region and municipality”. Could you please give us a list of the telecommunications administrations here involved? What will be the respective duties of these administrations?
7. State order 291 also aims at achieving the independence of the regulator from state suppliers: it relies on the principle of “separating administrative responsibilities of governments and enterprises”. How is this concretely ensured? Who manages the State participation in telecommunications companies? What is the role of the State in the restructuring of the sector?
8. Which authorities are in charge of the “planning, administration, rational distribution and fee-based utilisation of telecommunications resources” foreseen in Order 291, in particular as regards frequencies, numbers, and rights of ways?

III. DOMINANT CARRIERS

9. Article 17 of Order 291 defines the “leading telecommunications operator”. How are these operators going to be identified by the information industry authority under the State Council (as stated in that article)? For which services and under which criteria?
10. Which rules are going to be imposed on such operators?
11. Order 291 states that “market-oriented pricing shall apply to those telecommunications businesses where there exists complete market competition”. What does complete market competition mean? How will market competition be assessed?
12. Order 291 implies that in other cases there will be government-guided prices (for basic and value-added services) and government-fixed prices (for basic services). For basic services, what are

the telecommunications businesses subject to government-fixed pricing and those subject to government-guided prices? Who are the pricing authorities?

IV. INTERCONNECTION

13. Order 291 apparently imposes interconnection obligations on dominant operators. What are the characteristics of such interconnection? In particular, how is its cost computed: is it based on average cost, historical cost, replacement cost, long run incremental cost? What are the accounting methods of operators? Will leading telecommunications operators have a public reference interconnection offer? Will the regulator approve that offer?

14. Do all operators other than leading telecommunications operators need to file their interconnection agreements?

V. LICENSING

15. What is the step-by-step procedure to get a licence? Can companies already apply for new licences?

16. Can a carrier obtain one licence from the information industry authority in basic or value-added-services telecommunications business for the whole country? Alternatively, must a carrier obtain a licence from each province to provide telecommunications services in each of them and from the information industry authority to provide inter-province or international services? Do different levels of administration (such as the provincial and municipality level) act together on a single licence?

17. Apart from the segmentation between basic and value-added services, is there any other distinction that implies differing treatments for different services? In particular, article 65 of order 291 mentions a specific International Telecommunications Exit and Entry Bureau for international services: will international services be dealt with under the same criteria as other services?

18. There are a number of conditions to get a licence, pursuant to article 11 of Order 291. Will there be other conditions?. We do not understand how some of these provisions will be applied, e.g.: are there specific rules to assess the level of capital and the professionals required for certain types of services? How will the “credibility and capacity for providing long-term services for users” be judged?

19. Order 291 requires that construction of public telecommunications network shall be subject to overall planning and industry administration of the information industry authority under the State Council. Is this additional to authorisation processes for rights of ways? If yes, what is the rationale?

20. There are additional conditions imposed on foreign invested enterprises pursuant to the rules published in December 2001. Some of the conditions are imposed on the joint venture itself. Why are there specific minimum amounts for the capital registered for such joint ventures? Why is there a requirement that the main Chinese partner owns at least 30% of Chinese shares? Why is there a requirement that the main foreign partner owns at least 30% of foreign shares? Do such conditions exist for Chinese-owned operators?

21. Some conditions imposed on foreign invested enterprises are imposed on the Chinese partner of the joint venture, please explain some of them: What are « the prudential and special requirements set by the administrative department for information industry of the State Council » ? Also, what are « the capital and specialised professional appropriate for the relevant business operations » ? Why are such conditions imposed in addition to the general provisions mentioned in article 11 of Order 291 ?

22. Some conditions imposed on foreign invested enterprises are imposed on the foreign partner of the joint venture, please explain some of them: is it necessary for the principle foreign operator to have the “same type of basic telecommunications operators in the registration country or area” as the DIV is going to apply in China ? what does « a good business record and operational experience in the basic telecommunications services » mean ? Why are such conditions imposed in addition to the general provisions mentioned in article 11 of Order 291 ?

23. We have inferred from the legal texts we have that the procedure for a foreign invested joint venture to get a licence will be the following : (1) Opinion on Approval of the Foreign Invested JV by the relevant telecom administrative party; (2) MOFTEC Approval on the contracts and articles of association, (3) Issuance of the Operating Permit by relevant telecom administrative party, (4) Registration of the JV with the administration of industry and commerce. Is this correct? How different and how much longer will it be from the procedure for a Chinese-owned operator? Why should all the procedures be carried out by a Chinese partner?

24. Have any restrictions on the geographical scope of licences for foreign-invested enterprises been published?

25. Order 291 states that procedures to get a licence will take a maximum of six months. Can the procedures be much shorter than six months ?

26. How will existing operators be treated?

27. Article 12 of order 291 mentions bidding: when will there be bidding? Is it in order to grant spectrum or in other cases?

VI. UNIVERSAL SERVICE

28. What are the relevant legal texts for universal service (articles 37, 38 and 44 seem to address it)? What is the exact scope of universal telecommunications service obligations? When will the process of designation of operators in charge of providing universal service be decided? Upon which criteria?

29. Order 291 mentions the “need for subsidisation of the universal service”. Has a cost been identified? Are there any studies already identifying such a cost? Who is in charge of computing such costs and the amount of a possible subsidisation (order 291 mentions “relevant financial and pricing departments”)?
