

## COMMUNICATION FROM THE EUROPEAN COMMUNITIES

### Classification of legal services

The attached communication has been received from the delegation of the European Communities with the request that it be circulated to the Committee on Specific Commitments.

#### I. INTRODUCTION

1. The services sectoral classification list (W/120) has a single, undifferentiated entry for “legal services” listed under professional services, a sub-sector of business services, with a reference to UN CPC 861. The WTO Secretariat, in its background note of 6 July 1998,<sup>1</sup> has highlighted that the UN CPC distinction between advice and representation in criminal law, other fields of the law and statutory procedures was not as relevant to Members scheduling commitments as the distinction between advice and representation in host country, home country and international law.

2. There have been proposals to refine, improve and bring enhanced flexibility to the W/120 classification of legal services to reflect more clearly the commercial realities of transnational trade in legal services. They also aim to give Members the ability to increase the number and quality of their commitments in legal services without compromising the protection of domestic consumers, the quality of legal services and the safeguard of the rule of law. Some proposals in this area have just pointed to developing common definitions for foreign legal consultancy services and for the practice of international law.<sup>2</sup> One proposal has suggested that legal services be divided into sub-sectors that focus on the individual professions (lawyers, judges and other legal professionals not elsewhere classified).<sup>3</sup> Another one has proposed defining legal services as including the provision of legal advice or legal representation in such capacities as counselling in business transactions, participation in the governance of business organisations, mediation, arbitration and similar non-judicial dispute resolution services, public advocacy, and lobbying.<sup>4</sup> More recently, a specific proposal for classification suggested adding subcategories based on the area of law and the type of service.<sup>5</sup>

3. It is the EC view that those proposals fall short of capturing the entire range of cross-border legal services and do not necessarily entail the flexibility they intend to introduce. The W/120 has shown enough flexibility for Members’ scheduling of commitments and, together with a common

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<sup>1</sup> S/C/W/43.

<sup>2</sup> CSC Jobs No 2157 from the USA, dated 14 April 1999, No 3186 from Japan, dated 23 May 2000, and No 4977 from Korea, dated 9 August 2000. Also S/CSS/W/67 and S/CSS/W/67/Suppl. 1 from Australia, and incidentally S/CSS/W/52 (point 5), from Canada.

<sup>3</sup> S/CSS/W/12, from India.

<sup>4</sup> S/CSS/W/28 (point 5) from the USA.

<sup>5</sup> S/CSS/W/67/Suppl. 2 from Australia, S/CSC/W/32 and S/CSC/M/22 (point 3).

understanding of commitments, that classification can provide a useful basis to reflect modern international legal practice.

## II. WHAT ARE THE FEATURES OF CONTEMPORARY INTERNATIONAL LEGAL PRACTICE?

4. For a long time, lawyers and law firms have been doing most of their business within their own domestic market. Most clients' legal matters were confined to a single country and a lawyer's familiarity with that country's legal system was a qualification of particular importance. The internationalisation of the economy is modifying this trend.

- Owing to the increasing trade flows, consumers of legal services seek advice when carrying out cross-border transactions in which international law and different domestic laws often overlap. Modern commercial transactions, even at their most basic, routinely require legal advice on the laws of more than one jurisdiction. At the more complex end of the market, it is not unusual for clients to require advice on the laws of 10, even 15, jurisdictions, and in addition, in respect of international treaties between sovereign States.
- Lawyers are also moving and qualifying to practice<sup>6</sup> in jurisdictions other than their home country; sometimes they even cumulate qualifications to practice in more than one jurisdiction.

5. The increasing mobility of clients and lawyers alike and the international dimension of legal problems which need to be tackled in a globalised economy, have prompted an ever increasing need for international co-operation between lawyers and have given birth *inter alia* to the "migration" of lawyers, transnational partnerships and foreign establishments of law firms.

6. The ongoing globalisation of commercial activity by businesses makes it imperative that lawyers be able to provide to their clients advice and assistance respecting the laws of the jurisdictions in which they are qualified to practice, no matter the place or context in which these laws have to be examined (jurisdiction of the territory where the client is established, another jurisdiction, arbitration procedures). Whenever a client is requesting advice or assistance respecting laws of jurisdictions for which the lawyer is not qualified to practice, if that lawyer finds it difficult to obtain the required qualification, it is also imperative that the lawyer can co-operate, either through a network of "best friends" or through a partnership, with lawyers qualified therein. This possibility of co-operation is fundamental whenever the lawyer's client has to be represented in front of a national court or administrative body applying the procedural law of a jurisdiction for which the lawyer is not qualified to practice.

7. These requirements of contemporary international legal practice can be easily met by law firms, provided that they are allowed to recruit and/or to enter into partnership with lawyers qualified to practice in different jurisdictions.

## III. WHAT IS THE SCOPE OF COMMITMENTS UNDERTAKEN BY WTO MEMBERS IN RESPECT OF LEGAL SERVICES?

8. A survey of the schedules of commitments in the legal services sub-sector shows that only a few WTO Members have taken commitments for all legal services. **Most WTO Members** who have liberalised trade in legal services **have limited their commitments to legal advice** (or legal consultancy), probably because they feared the situation where a foreign lawyer not admitted to the

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<sup>6</sup> For the purpose of this paper the terms "qualification to practice as a lawyer" should be understood as a "licensing" within the meaning of Article VI of GATS.

Bar in their territory could represent clients in front of their national courts. In addition, most of the commitments refer to the fields of law that they cover, using for that purpose **the distinction between host country, home country, third country and international law.**

9. This terminology seems to be mainly based on a world where lawyers are qualified to practice only in their own country or jurisdiction and raises many questions. In particular:

- The concept of home country law, which can be defined as the law of the country or jurisdiction where the lawyer is qualified to practice, might overlap with the concept of host country law<sup>7</sup>.
- The concept of third country law can receive two possible interpretations. Either it is any third country law where the lawyer is qualified to practice, as indicated in the classification proposals that have been submitted so far, in which case the concept overlaps with the concept of home country law. Or it is the law of any country (other than the host country) where the lawyer is not necessarily qualified to practice, in which case the concept becomes controversial for reasons of consumer protection.
- The definition of international law is also fraught with difficulties. Law can be considered as international by its sources<sup>8</sup>, by its content (more than one country is involved) and by the jurisdiction charged with its application and/or interpretation (an international court or tribunal). Some proposals have put the emphasis on the content and consider that international law consists of rules and principles of general application dealing with the conduct of States and of international organisations and with their relations, as well as with some of their relations with persons, whether natural or juridical, covering therefore private international law. Others go even further to include also law related to international business transactions. Many Members, and among them the EC, consider instead that private international law and law related to international business transactions are mainly part of domestic law or of a combination of several domestic laws. International law would therefore be limited to public international law.
- Specific consideration will have to be given in this context to the *sui generis* supranational legal orders that have been developed in the framework of integration processes. As regards EC law, this should not be considered as international law but as domestic EC law. Indeed, the EC constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law

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<sup>7</sup> In effect, a national of country A who qualifies as a lawyer in that country and is subsequently admitted to the Bar in country B provides legal services in the home country law of A and B. Likewise, the lawyers qualified in country B that are employed in the office opened in that country by a law firm whose primary establishment is located in country A, are providing legal services in their home country (which is the law of B). From the point of view of country B, whenever those lawyers practice in their territory, they will be providing legal services in host country law.

<sup>8</sup> See Article 38 of the Statute of the International Court of Justice.

and without the legal basis of the Community itself being called into question.<sup>9</sup>

10. Most **commitments** have been **made in respect of international law (or specifically public international law) and home country law**. In this situation, the exact coverage of the commitments varies depending on the way that they have been scheduled:

- In some cases, the schedule expressly indicates that the host country law is not committed (or unbound) or that the commitments only cover foreign law.
- In other cases, no express indication is made under the sectoral coverage of the commitments, but additional commitments are undertaken with regard to host country law, and therefore host country law seems to be excluded from the commitments in so far that it is not covered by those additional commitments.
- Finally, there are cases where no reference whatsoever is made to host country law, leaving therefore open the interpretation of those commitments<sup>10</sup>.

11. The exact coverage of the commitments is easier to determine when the commitments are made in respect to **the law of jurisdiction where the service supplier is qualified**. From a technical point of view, it is however doubtful that those commitments reflect the situation of law firms, where it is not the service supplier itself but its personnel who is qualified to practice.

#### **IV. IS CONTEMPORARY INTERNATIONAL LEGAL PRACTICE CORRECTLY AND COMPLETELY ADDRESSED BY THOSE COMMITMENTS?**

12. The EC considers that none of the approaches based on a distinction between different fields of law addresses all the requirements of modern international legal practice. Such analysis is valid for commitments extending to all legal services, and even more when these are limited to legal advice only. Indeed, all those approaches mix unnecessarily the definition of a service with the necessary qualifications to provide it and, consequently, tend to overlook the situation of law firms.

13. For classification purposes, the only parameter to be taken into account should be the nature of the different services that can be provided by legal professionals. In this regard, the UN CPC classification, after the revision of 1997 which added arbitration and conciliation services, is quite exhaustive. It even extends to activities that are performed mainly by the legal professions, but not only by them (conciliation and mediation, advice on tax laws).

14. In this context, it has to be noted that there are a number of legal professionals who are entrusted with public functions (e.g. judges, notaries, etc.). In conformity with Article I:3 of GATS, they should not be affected by commitments undertaken with regard to legal services, even if their activity could be considered as included among those described by CPC 861<sup>11</sup>. However, in case the entire WTO membership would not agree with a full exclusion of some of those legal professionals

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<sup>9</sup> See judgements of the European Court of Justice of 5 February 1963, case 26/62, Van Gend & Loos, [1963] ECR I, and of 15 July 1964, case 6/64 Costa /ENEL, [1964] ECR 585.

<sup>10</sup> In the absence of a rigid classification, such commitments cover foreign home country law and host country law whenever the foreign lawyer is qualified to practice both. If such rigid classification were to be introduced, as suggested by some proposals, foreign lawyers who would have qualified to practice the law of the host country would not be covered by the commitment.

<sup>11</sup> Likewise, for example, members of a national court of auditors are not affected by commitments undertaken with regard to auditing services, even if they provide auditing services (e.g. auditing the accounts of government or of public undertakings).

from the GATS, Members always have the possibility, in order to dissipate any doubt, of not binding the provision of legal services by legal professionals entrusted with public functions.

15. A further sub-distinction of the legal services described in CPC 861 based on different fields of law raises problems for drawing the line between international law and national law, as well as between home and host country law. In addition, such a distinction, which is unknown to other services sub-sectors, appears unnecessary in so far as, through licensing requirements imposed on legal services providers, a Member can certainly ensure that a lawyer can only provide legal services in fields of law for which he/she is qualified to practice<sup>12</sup>. An indication of the fields of law might only be useful to indicate whether the Member considers opening or not opening its market to the provision of legal services in the law of any country (except the host country) for which the foreign lawyer is not qualified to practice.

16. The imperatives of modern international legal practice suggest that commitments be entered with regard to all legal services included in CPC 861. In order to address properly the possibility for a foreign lawyer to co-operate with locally qualified lawyers and the possibility for a foreign law firm to recruit and/or to enter into partnership with locally qualified lawyers, with a view to assuring the representation of their clients in front of a national court or administrative body in the host country or in arbitration procedures, commitments limiting the scope of practice to legal advice services are insufficient. While some schedules try to overcome those limitations through additional commitments, this solution appears to be a technical pirouette unique in the GATS context<sup>1314</sup>.

17. By undertaking commitments with regard to all legal services, Members would not be obliged to allow the representation before their national courts or administrative bodies by lawyers who are not qualified to practice the national law. In effect, since the practice of the national law (that includes the procedural law applied by those courts and bodies) is subject to the licensing conditions that apply in that Member, only those lawyers duly qualified in the jurisdiction of the Member concerned will be able to provide representation services. In this context, unless a specific limitation is scheduled for the market access in mode 3, such a lawyer will be able to represent clients either on his/her own or on behalf of a foreign law firm that has employed or entered into partnership with him/her.

18. Commitments in respect of legal services in general can still be restricted by Members by way of scheduling specific limitations on market access or national treatment in accordance with Articles XVI and XVII of GATS (e.g. nationality or residency conditions to enter the national Bar, quotas.). In the light of the requirements of modern international legal practice, it will be up to Members to negotiate the scope of such limitations.

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<sup>12</sup> In the sub-sector of auditing, for example, the different schedules do not distinguish between audits required by the host country law and audits required by foreign laws. However, Members that have committed auditing services, can deny a licence for carrying out audits required by the host country law if the individual auditor does not satisfy the required qualifications.

<sup>13</sup> In the rest of the services sectors, the possibility (and more normally the obligation) to enter into partnership with local service suppliers or to recruit personnel in the host country are issues dealt with through the market access and national treatment columns.

<sup>14</sup> For example, in taxation services, one could imagine the case where a Member, fearing that foreign tax advisors are not sufficiently qualified to advise on the local taxes, imposes on them the need to complete their qualifications. However, from a consumer protection point of view, that Member has in principle no objection to foreign tax advisors working together with locally qualified tax advisors or to foreign firms specialised in tax advice entering into their market through tax advisors qualified with regard to the local taxation. Such case is properly addressed through the undertaking of commitments for all taxation services, without having to limit the scope of the commitments to taxation services in local taxes and to introduce an additional commitment authorising foreign firms specialised in tax advice to enter into partnership with or recruit tax advisors qualified with regard to the local taxation.

**V. CONCLUSION: THE FLEXIBILITY OF THE ACTUAL CLASSIFICATION FOR INCREASING THE NUMBER AND QUALITY OF COMMITMENTS**

19. On the basis of the above-mentioned considerations, the EC consider that the number and quality of commitments in the sub-sector of legal services can be increased without altering the W/120 classification. To this end, commitments should cover all legal services without further specification on the scope of activities. As regard the fields of law, while there is no need to reflect them in the schedules, it might be useful that Members indicate whether commitments are limited to the laws in which the service supplier or its personnel is a qualified lawyer or, if they so wish, to cover also laws in which the service supplier or its personnel is not qualified.

20. As for other services sectors, market access and national treatment limitations would have to be listed under the relevant mode. As regards non-discriminatory regulatory measures as defined in Article VI:4 of GATS (e.g. registration with the Bar in the host country, compliance with the code of ethics of that Bar, use of home title...), they do not need as such to be listed in the schedules but a reference in a note might prove useful.

21. For ease of reference the following example is provided:

Legal services (CPC 861 + arbitration and conciliation services)*	1	1	
	2	2	
	3	3	
	4	4	

\* Provision of legal services is only authorised in respect of public international law and the law of any jurisdiction where the service supplier or its personnel is qualified to practice as a lawyer, and, like the provision of other services, is subject to licensing requirements and procedures applicable in [COUNTRY]. For lawyers providing legal services in respect of public international law and foreign law, these may take *inter alia* the form of compliance with local codes of ethics, use of home title (unless recognition with the host title has been obtained), insurance requirements, simple registration with the host country Bar or a simplified admission to the host country Bar through an aptitude test. Legal services in respect of [COUNTRY] law shall in principle be carried out by or through a fully qualified lawyer admitted to the [COUNTRY] Bar acting personally. Full admission to the Bar in [COUNTRY] might therefore be necessary for representation before courts and other competent authorities in [COUNTRY] since it involves practice of national procedural law.

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