

ClientAlert

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Internet Neutrality and WTO Rules

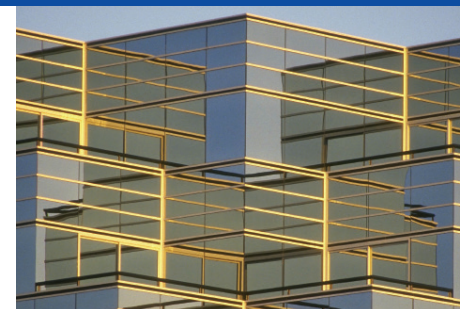
On February 27, 2015, the U.S. Federal Communications Commission (FCC) adopted new rules regarding the provision of access to the internet, commonly known as “net neutrality” rules. The main effect of these changes, which have not yet been implemented, would be to bring network owners that provide primary access to the internet within the scope of Title II of the Telecommunications Act of 1934, thus making them subject to regulation as telecommunications companies providing a public good. The decision of the FCC to regulate network access provision under Title II raises the possibility that the United States would now accept that these services are covered by the World Trade Organization’s General Agreement on Trade in Services (GATS) Annex on Telecommunications and the GATS Reference Paper on Basic Telecommunications. From the viewpoint of the WTO this is a significant change.

Status of Internet Services Under the GATS

The GATS contains two instruments which govern the regulation of basic telecommunications services. First, the GATS Annex on Telecommunications requires, *inter alia*, that:

Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule.¹

The purpose of this provision is to ensure that foreign suppliers of any service on which a GATS commitment is made should have full and non-discriminatory access to public telecommunication services; it is obvious that discriminatory or impaired access to these essential services would handicap any business. In 2004, the United States won a WTO dispute against Mexico in which the Panel found that Mexico had violated its GATS commitments by (i) failing “to ensure interconnection at cost-oriented rates;” (ii) failing to “prevent anti-competitive practices by firms that are major telecoms suppliers;” and (iii) failing “to ensure reasonable and non-discriminatory access to and use of telecommunications networks.”



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¹ Paragraph 5(a), *GATS Annex on Telecommunications*.

Secondly, the GATS Reference Paper on Basic Telecommunications, which binds those Members that have accepted it, including the United States, requires *inter alia* that:

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided

- (a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates.²

The purpose of the Reference Paper is to ensure that major suppliers of basic telecommunications services (i) do not engage in anti-competitive practices, and (ii) provide non-discriminatory interconnection with their networks, even to competitors.

Both the Annex and the Reference Paper apply explicitly to basic telecommunications services. The United States has consistently maintained that internet access provision is a “value-added” and not a “basic” service and, therefore, is not subject to these disciplines. In 2002, the FCC referred to internet access providers as “information providers”. Some other Members have not shared this view. Australia, for example, has argued that internet access is an essential service akin to a public utility and should be regulated accordingly. The borderline between basic and value-added services has never been defined and has never been subject to WTO dispute settlement.

Title II of the Telecommunications Act of 1934 deals with the regulation of “common carriers”. Its original purpose was to regulate public telephone monopolies and it is still used to regulate dominant suppliers. The classification of internet access providers under Title II means that they would fall under the definition of “public telecommunication transport services” in the GATS Annex on Telecommunications as “any telecommunications transport service required, explicitly or in effect, by a Member to be offered

to the public generally.”³ This implies that the United States would no longer argue that these services are not covered by the Annex or the Reference Paper, which defines a major supplier as

“a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

- (a) control over essential facilities; or
- (b) use of its position in the market.”⁴

The US government has not yet stated how it views the potential GATS implications of the FCC’s reclassification of internet access provision under Title II.

Net Neutrality and Discrimination Under the GATS

Proponents of strong internet neutrality rules have argued that the rules which were in contemplation by the FCC before the recent decision, which would have permitted differentiated treatment of service providers, including “fast lane” access to those paying a premium, would have been inconsistent with the GATS non-discrimination disciplines. It is suggested that differentiated treatment is by definition discriminatory, and that service suppliers of developing countries, in particular, would be disadvantaged or excluded from certain services by premium charges.

It is not clear, however, that differentiated charging would in itself breach the non-discrimination obligation. The GATS is not in general concerned with the prices at which services are supplied, and the normal presumption would be that to charge a higher price for a higher quality of service is not discriminatory, if the service is available to all those willing and able to pay for it. On the other hand, to charge higher prices to some clients than to others for the same service would appear to be discriminatory. A complete discrimination analysis therefore would depend on the manner in which the differentiation was effected and justified.

² Paragraph 2.2(a), *Reference Paper on regulatory framework for basic telecommunications*.

³ Paragraph 3(b), *GATS Annex on Telecommunications*.

⁴ *Reference Paper on regulation of basic telecommunications: Definitions*

Other forms of discrimination, for example to restrict or refuse access to certain suppliers or applications for non-technical reasons, could breach the Reference Paper's provision on competitive safeguards. This provides as follows

1.1 Prevention of anti-competitive practices in telecommunications:

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.⁵

The establishment of internet neutrality should in principle obviate the danger of inconsistency with these WTO obligations. This would provide a useful degree of additional security and predictability for foreign suppliers of internet services in the US market. However, until details of the proposed new rules are made known it is impossible to assess the implications for U.S. obligations under the GATS. Indeed, some original proponents of net neutrality have recently reversed course and opposed the new FCC rules because they believe that the extensive new regulations go far beyond a basic non-discrimination rule and instead provide the FCC with open-ended discretion to regulate internet service and potentially even content. If such views are correct, the new rules could raise discrimination concerns with respect to services that may be said to constitute "basic telecommunications services" under the GATS.

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⁵ Paragraph 1.1, *Reference Paper on regulatory framework for basic telecommunications*.