



*Third Position Paper of the EUROPEAN SERVICES FORUM on
The Temporary Movement of Key Business Personnel*

Introduction and scope of this paper

- 1 In today's global markets people are increasingly mobile. But in many countries they run into barriers such as complex and time-consuming procedures to obtain work permits and visas. They may also face quantitative and qualitative restrictions such as Economic Needs Tests (ENTs) and local market restrictions. For business people who need to work away from their home country for relatively short and fixed periods of time, often only for a few months, for the purposes of an intra-corporate transfer or (in the case of a professional person or consultant, for example) to fulfil a contractual obligation to a client in another country, these barriers can add significantly to the cost of business, reduce service providers' efficiency and damage international competitiveness. Barriers to mobility can also impede the spread of ideas and know-how which lies at the heart of successful development¹ and from which countries in the developed world can also benefit.
- 2 The European Services Forum (ESF) has called on the European Commission and Member States in two previous position papers to raise the *temporary* movement of people for discussion by WTO Member countries, as part of the negotiations under the General Agreement on Trade in Services (GATS).² The ESF's views were - and remain - confined to measures which impede or restrict the temporary movement of particular categories of persons, described as "key business personnel". They are not concerned with measures governing immigration.³
- 3 ESF's first position paper urged the need for agreement on common definitions of "key business personnel" and common terms for intra-corporate transfers; it argued for improved transparency of procedures and called for the provision of expedited arrangements for the temporary movement of such personnel.
- 4 The second paper made further recommendations to achieve more predictable, harmonised and transparent arrangements for the temporary movement of key business personnel, based on a more detailed analysis of the problems experienced by different services sectors in the EU. In order to improve the effectiveness of existing commitments made under Mode 4 of the GATS and to provide a stimulus for further liberalisation, the ESF's second position paper recommended:

¹ See, for example, *Eliminating World Poverty: Making Globalisation Work for the Poor* (UK Government White Paper, Cm 5006, 2000), para 127.

² See the position papers on temporary movement of key business personnel of 19 October 1999 and 24 October 2000. (The text of these and other ESF position papers is available at www.esf.be)

³ The term "key business personnel" is used in this paper to describe people with higher level skills, that is to say specialist, technical or managerial personnel. A similar expression, "Key Personnel", is used in Article 52, paragraph 2 of the *European Agreement establishing an association between the European Communities and their Member States [...] and Poland for the purposes of rights of establishment*. This provision refers to senior employees of an organisation with a significant management responsibility and to persons employed by an organisation who possess "high or uncommon" qualifications or knowledge. The definition includes, but is not limited to, accredited professions. It should be noted that the GATS does not apply to natural persons seeking access to the employment market of a Member, nor does it apply to measures regarding citizenship, residence or employment on a permanent basis: *Annex on Movement of Natural Persons Supplying Services under the Agreement*, para 2

- the development of a minimum set of Mode 4 requirements which could be applied both horizontally and sectorally: it proposed that a core set of requirements should be embodied in a model schedule
 - the creation of Mode 4 horizontal commitments to align with agreed principles: it proposed an expedited procedure – a GATS Permit – for intra-corporate transfers and to facilitate the temporary movement of contract services providers; and the creation of a new category of “intra-corporate transfer for training and development”
- 5 Not long after the release of the ESF’s second position paper, the Indian Government put forward proposals⁴ for the liberalisation of barriers to the movement of professional people. Subsequently other horizontal proposals on movement of persons have been circulated to the WTO Council for Trade in Services from the United States,⁵ Canada,⁶ the European Communities and their Member States⁷ and Japan⁸ in addition to a number of sectoral proposals from these and other Members.⁹
- 6 The ESF welcomes the growing interest among WTO Members to consider the removal of barriers to the temporary movement of people under the GATS.¹⁰ In the context of discussion of the various negotiating proposals in the Council of Trade in Services, the ESF has:
- Reviewed and commented on the horizontal proposals on temporary movement of persons (paras 8 – 21 below)
 - Summarised the key recommendations of its second position paper (para 22 below)
 - Annexed a draft model schedule which has been prepared by one of its members as an example of how to give practical effect to the kind of changes the ESF is advocating (see paras 23 – 24 below and the Annex)

⁴ S/CSS/W/12, 24 November 2000, *Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS)*.

⁵ S/CSS/W/29, 18 December 2000, *Movement of Natural Persons*.

⁶ S/CSS/W/48, 14 March 2001, *Initial Negotiating Proposal on Temporary Movement of Natural Persons Supplying Services under the GATS (Mode 4)*.

⁷ S/CSS/W/45, 14 March 2001, *GATS 2000: Temporary Movement of Service Suppliers*. Technically this is not a proposal, merely a communication on the subject of movement of persons.

⁸ S/CSS/W/42/Suppl.2, 6 July 2001, *Movement of Natural Persons – Supplement*.

⁹ These include proposals developed to a greater or lesser degree from Australia (covering Accountancy Services, Architectural Services, Construction and Related Engineering Services, Financial Services and Legal Services (S/CSS/W/62-4, 66-67 respectively)); Canada (covering Financial Services (S/CSS/W50), Professional Services (S/CSS/W52) and Business Services (S/CSS/W55)); the EU (on Professional Services (S/CSS/W33), Business Services (S/CSS/W34), Energy Services (S/CSS/W60) and Postal/Courier Services (S/CSS/W61)); New Zealand (Sporting Services (S/CSS/W94)); and from Switzerland (covering Professional Services (S/CSS/W75), Environmental Services (S/CSS/W76) and Tourism Services (S/CSS/W79)). See also the proposals by Chile (S/CSS/W/88) and Japan (S/CSS/W/42).

¹⁰ WTO Members’ interests are reflected in related aspects of the mobility of persons in the developed as well as developing world (driven in part by the need to address skills’ shortages in particular sectors like ICT and health): see, for example, the UK Government’s response to the International Development Committee’s Report on *The Globalisation White Paper* referring to research commissioned by the UK Government to assess the impact of the migration of skilled people on poverty reduction in developing countries; the European Commission’s proposals (*New European Labour Markets, Open to All with Access for All COM (2001) 116 final*) to improve access to new European labour markets; efforts to improve the mobility of non-EU nationals from one EU Member State to another; and the work of the OECD on Mode 4 to help inform the current GATS negotiations.

- 7 The ESF has put forward this third position paper on movement of persons in order to stimulate and inform further discussion in the European Commission as well as among the Member States, WTO Members and others more widely. It is hoped that this paper will sharpen the focus of discussion and pave the way for action.

Review of horizontal proposals on movement of persons

- 8 We consider the proposals which have been submitted to date in turn below.

INDIA

- 9 The Indian proposal, which is the most ambitious of the 5 proposals to have been tabled on Movement of Natural Persons, contains 5 main features:
- Common definitions and broad definitions of professional personnel (to include middle and lower level professionals) to be covered by horizontal commitments applying to all scheduled sectors together with a more detailed classification of categories of personnel by sector with reference to the International Standard Classification of Occupation (ISCO), for example to include "Computer Assistants" and "Computer Equipment Operators"
 - Clear criteria for ENTs to be set out in a reference paper
 - A "GATS Visa" for the broad range of personnel covered by horizontal and sectoral commitments under Mode 4; ordinary immigration rules should be disapplied for the purpose of gaining temporary entry and the procedures for obtaining temporary entry should be made more transparent, streamlined and expedited (visas to be granted within 2-4 weeks)
 - Bilateral Totalisation Agreements to be agreed between developing and developed countries to address social security issues
 - Strengthening of norms and disciplines in the recognition of qualifications through prompt notification of Mutual Recognition Agreements (MRAs) with the WTO and development of minimalistic accreditation standards to overcome national requirements
- 10 The ESF strongly supports the Indian proposals for an expedited and more transparent process for obtaining temporary entry. These go to the heart of a number of the concerns of European services' providers. However, there are several aspects of the proposals where the ESF believes further discussion is needed. First, by including lower levels of personnel than the "specialist, technical or managerial personnel" that it has proposed, the ESF considers the scope of the Indian proposals goes wider than is likely to be achievable in practice. Secondly, the ESF has some concerns about whether the ISCO nomenclature is the right one to address the specificity of job categories addressed by these negotiations. Thirdly, the ESF is doubtful whether the WTO provides a manageable framework for addressing differences between Members about social security measures. Fourthly, by including the issue of mutual recognition of qualifications in these proposals, the ESF considers there is a significant risk that India's proposals as a whole could be jeopardised if Members are asked to tackle the difficult (and potentially very time-

consuming) issue of mutual recognition of professional qualifications on a multilateral basis as part of a package of improvements on mobility.

UNITED STATES

- 11 In a modest, one-page proposal the United States calls on Members initially to address the need for additional regulatory disciplines to ensure full implementation of existing and potential new market access commitments in Mode 4. In particular they propose:
- Improved access to information about the laws and regulations covering temporary entry
 - Greater transparency including prompt responses to visa applications and an opportunity for interested parties to comment on proposed new or amended regulations
- 12 The ESF is disappointed that these proposals focus entirely on transparency enhancements of the most general kind which do little to add to the general obligations on Members under the GATS. In practice they will not do much to address the time-consuming and costly experiences which service providers face in seeking the temporary movement of skilled personnel. The ESF therefore calls on the United States to reconsider its position on mobility or at least to consider other proposals which have been (or may be) tabled sympathetically.

EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

- 13 The Communities' communication calls for reflection on three main aspects related to Mode 4:
- Harmonisation of definitions and descriptions of "intra-corporate transferees, executives, managers, specialists and contract services providers" (which could form the basis of a model schedule)
 - Elaboration of a common code of practice for ENTs, to improve transparency and reduce opportunities for arbitrary and discriminatory application
 - Improvements in access to information (for example through national websites)
- 14 The ESF is pleased that the European Communities accept that the trend towards increased temporary presence abroad of services suppliers (and, frequently, the calls for immediate availability of such suppliers) is making Mode 4 a much more important mode of delivery under the GATS than was the case during the earlier negotiations. It should indeed be possible, in the words of the Communities' proposal, "to establish a predictable, harmonised and transparent system with the overall objective of allowing the necessary mobility of services suppliers on a temporary basis *without compromising immigration policy*" [emphasis supplied].
- 15 The ESF therefore welcomes the European Communities' proposals for discussion about improving the clarity of definitions used in scheduled commitments (without reference to any specific classification such as ISCO). It also welcomes the

proposals to discuss a code of practice in order to make ENTs more specific and transparent and to improve access to information.

- 16 But the ESF considers that much more can - and should - be done. Under the Communities' proposal if WTO Members are unable or unwilling to agree on a multilateral basis the relatively modest, low-cost definitional improvements proposed by the EU the prospects of making any substantial progress on a genuine market access agenda and other matters look slim - and European services providers will be placed increasingly at a competitive disadvantage in world markets. The EU's proposal does nothing to create expedited procedures for the temporary movement of defined categories of personnel.

CANADA

- 17 The Canadian proposals address both market access improvements and strengthened transparency obligations to benefit service providers (including SMEs and those providing services in other countries on a contractual basis and unlinked to a commercial presence). Canada proposes:

- Improvements in Mode 4 commitments including persons entering as contract services providers as well as general business visitors and professionals
- Improvements in the transparency and predictability of procedures as well as criteria for ENTs and improvements in information relating to maximum length of stay under specified commitments
- Discussion of Mode 4 issues, for example within a temporary *ad hoc* group reporting to the Council on Trade in Services Special Session

- 18 The ESF supports the Canada's call to all WTO Members to put more attention on Mode 4 proposals in the services negotiations. Unlike the EU and US proposals, Canada makes clear its intention to see improvements in the current schedules of commitments by all countries in the area of Mode 4. The ESF particularly welcomes the creation of a forum in Geneva which could help to promote discussion about this mode of supply. An *ad hoc* group, coupled with a seminar involving representatives of government (including immigration and labour authorities) and business, academics and members of civil society, could identify particular aspects of administration and procedure relating to the temporary movement of particular categories of personnel.

JAPAN

- 19 The Japanese paper recognises that while WTO Members' commitments under Mode 4 are less comprehensive than under other modes of supply, globalisation of economic activity and the development of technology are creating increased demands for services supplied by highly skilled professionals. Acceptance of the temporary stay of these highly skilled professionals from foreign countries will contribute to the economic development and international competitiveness of a host country. The Japanese paper, like the communication from the European Communities, emphasises that temporary entry of service suppliers should not have any influence on a Member's long-term immigration policy and control. Japan looks forward to:

- A reduction of restrictions on the movement of senior management personnel having a high level of expertise through improved horizontal commitments covering intra-corporate transferees
 - Enhanced transparency of immigration procedures (including better provision of information on laws and regulations) and simplification of those procedures to facilitate a more rapid movement of service suppliers
 - Identification of criteria for the use of ENTs and, in due course, the elimination of limitations on service suppliers under ENTs
- 20 The ESF welcomes Japan's recognition of the increasing significance of Mode 4 in the process of liberalisation of trade in services in general. It shares Japan's expectations about improving commitments under this mode of supply, as far as they go. Liberalisation should bring benefits to both exporting and importing countries. The ESF agrees with Japan's assessment that liberalisation under Mode 4 is a "win-win" situation, for developed as well as developing countries. The ESF agrees that it should be possible to achieve improved horizontal commitments but these should not be confined to intra-corporate transferees. They should apply to highly skilled contract services' workers within the scope of "key business personnel".

Overall assessment of proposals

- 21 There is much in the horizontal proposals that have been submitted with which the ESF agrees. It welcomes the growing interest in the temporary movement of personnel. It very much hopes that the papers that have been submitted to the WTO by Canada, the European Communities, India, Japan and the United States will help to stimulate a genuine debate about the need for further liberalisation under Mode 4. The ESF looks forward to contributing to forthcoming discussions, in Geneva and WTO Members' capitals. But it also calls on the European Commission, the EU Member States and others to raise their game, to address a genuine market access agenda, on a horizontal and sectoral basis, and to commit to take action.

Summary of ESF position on temporary movement of personnel

- 22 The ESF calls on GATS negotiators urgently to focus on the following 4 goals:
- **Develop a minimum set of Mode 4 requirements which could be applied both horizontally and sectorally.** These could be specified in a draft Model Schedule (an example of which is annexed). These principles would govern such matters as minimum durations of stay and circumstances in which ENTs could be justified. A core set of Mode 4 requirements could help WTO Members make comparative assessments of regulatory responses to the temporary movement of persons assessed against the needs of international trade – and thereby reduce the scope for politically charged debates on domestic levels
 - **Create Mode 4 commitments to align with agreed principles.** Existing horizontal commitments should be reviewed to determine whether they are sufficiently detailed and specific, and reformulated with the draft Model Schedule

- **Create a "GATS Permit" for intra-corporate transfers and contract services providers.** This would facilitate the temporary movement of defined categories of personnel. For example, businesses that are certified by immigration authorities could be allowed to self-administer transfers that satisfied appropriate criteria, subject to strict conditions of use
- **Create a new category of intra-corporate transfer for training and career development.** This would offer additional flexibility to developed countries to benefit developing country Members by increasing the knowledge, skills and experience of the key business personnel of the future

Realising these goals: Draft Model Schedule

- 23 The ESF has never under-estimated the difficulties of liberalising barriers to the movement of persons. However, there is now growing support for an internationally co-ordinated effort to overcome these barriers.
- 24 The ESF hopes that the annexed draft Model Schedule, which has been prepared in order to stimulate discussion, will help GATS negotiators concentrate on the practical issues to which business, government and civil society should now direct their attention. The draft Model Schedule is offered for consideration as an example – and it is only one example - of how trade negotiators might approach the task of implementing the ESF's recommendations. Details of the proposed scheme (such as financial thresholds for bonds and contract values) are illustrative and intended to provide a starting point for discussion. The ESF welcomes the views of trade, labour market and immigration officials as well as others in the wider community who have an interest in improving arrangements for the temporary movement of key business personnel.

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