

COMMUNICATION FROM THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

GATS 2000: Temporary Movement of Service Suppliers

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

I. INTRODUCTION

1. The objective of this present Communication is to propose for reflection and discussion a series of elements which could constitute potential areas for additional commitments and regulatory disciplines for existing and new market access Mode 4 commitments.
2. Direct contact between the consumer and the supplier is often essential for the efficient supply of services. The profound structural changes that have taken place in post-industrial economies, have fuelled an increased demand for highly skilled service suppliers. The growing dynamism of global markets means a shorter reaction time-span to problem-solving, which frequently calls for the immediate availability of services suppliers. This is exacerbated by the need to adapt to the requirements of new technologies, management structures and the advent of a global economy. The development of high-speed lower-cost transport services and communication networks reinforces the trend towards increased temporary presence abroad, rendering the temporary movement of natural persons even more important a mode of delivery. In particular, firms operating internationally, including in the implementation of services contracts, need to transfer expertise internationally through the temporary relocation of specialists, professionals and contractual service suppliers.
3. It is important to point out at the outset of the GATS 2000 Negotiations that the temporary movement of service suppliers in the framework of GATS is a very delicate subject for all participants reflecting the importance all attach to the objective of regulating the presence of foreigners on their territory.
4. This Communication is to be read in the context of the Marrakech Annex on "Movement of Natural Persons", which establishes that "the Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis". The Annex also establishes that "the Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment".

5. While taking account of the wider sensitivities, the European Communities and their Member State¹ consider that broader and deeper commitments under mode 4 would improve the capacity of all countries to compete in trade in services, and would, combined with improvements in other modes, expand the choice of operating strategies for economic actors.

6. Mode 4 liberalisation has so far been based mostly on a horizontal approach. The EU recognises some benefit to a sectoral approach based on more specific categories of skilled personnel activities. Nonetheless, prior to explore further this avenue, the EU would consider it logical first to build and improve on the existing horizontal approach. Nevertheless, this will require careful study.

7. In particular, the EU believes that Members should reflect on the opportunity to elaborate appropriate additional horizontal disciplines related to the temporary movement of service suppliers. Improved regulatory disciplines, as well as clarified and harmonised definitions should aim at better practical applicability of mode 4 commitments. Together with potential additional commitments, it should be possible to establish a predictable, harmonised and transparent system with the overall objective of allowing the necessary mobility of service suppliers on a temporary basis without compromising immigration policy.

II. ANALYSIS

8. Specifically, under mode 4 commitments, definitions of terms such as personnel, administrators, managers, specialists, executives, senior personnel and professionals are often neither clear nor consistent between different country schedules. Therefore, they can be subject to arbitrary and discriminatory application by regulatory authorities. Vague terms and definitions lay the ground for administrative discretion. This is particularly relevant as Mode 4 commitments are applied in a very decentralised manner by, for example, employment, consular or immigration authorities. These problems bring about considerable implementation issues and create serious difficulties for economic operators. There is also a risk for potential dispute settlement cases.

9. Labour market tests are a market access related category of limitations that requires particular attention. In most instances, unspecified labour market tests practically fulfil the role of a permanent safeguard measure. The EU is of the view that an unspecified labour market test is, for the most part, equivalent to an unbound.

Areas for Reflection

Members should reflect on the following aspects related to mode 4

10. Harmonisation of the definitions and/or description of the Mode 4 categories including in the context of intra-corporate transferees. A discussion could be launched on the opportunity to ensure that GATS Members agree on common terms and definitions for intra-corporate transferees, executives, managers specialists and contractual service providers. This harmonisation effort could take into account, as far as relevant, the work already carried out by other international organisations. Common definitions could potentially form the basis of a model schedule.

11. The specification of unspecified labour market tests from future commitments so as to ensure effective application of mode 4 liberalisation. The elaboration of a common code of practice for economic needs tests with the objective to render them more specific and transparent, define their application criteria, make them non-discriminatory and impose a due process procedure could be highly desirable.

¹ Later referred to as the European Union (EU).

12. Building on GATS Article III:4, with a view to achieving greater transparency the conditions under which service providers may temporarily enter and stay in the territory of Members should be regulated appropriately and clearly, setting out their rights and obligations and ensuring that they have access to this information and that there are mechanisms in place to see that it is applied fairly. This could imply, amongst others, provisions to facilitate the swift adoption of decisions on individual applications to temporarily enter and stay as service provider both in the interest of the enterprise delivering the service and the person concerned, on the basis of objective and verifiable criteria and the development of clear, simple and predictable application procedures.

13. General policies on access to information would greatly enhance transparency. For example national information points (e.g. websites) could be created and maintained which could contain a complete set of information relating to the admission of natural persons providing services and giving contact details of national authorities competent to receive applications for relevant permits/applications.
