

Opinion of the European Economic and Social Committee on the General agreement on trade in services (GATS) — Mode 4 negotiations (movement of physical persons)

(2005/C 286/06)

On 20 January 2003, the Commission, in a letter from Commissioner Lamy, decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the *General agreement on trade in services (GATS) — Mode 4 negotiations (movement of physical persons)*.

The Section for External Relations, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 20 May 2005. The rapporteur was Ms Florio.

At its 418th plenary session, held on 8 June 2005 the European Economic and Social Committee adopted the following opinion by 134 votes to 1 with 7 abstentions.

Introduction

The EESC has established constructive relations of cooperation and dialogue with the European Commission's Directorate General Trade in various fora (conferences, opinions, institutional meetings). In particular, during his mandate, the previous Commissioner, Pascal Lamy held several discussions with the European Economic and Social Committee on issues relating to international trade, human rights, and the WTO negotiations.

The EESC now presents its proposal for a discussion of the GATS Mode 4 negotiations, which are considered to be a key element in ongoing WTO negotiations for opening up international trade in services. The free movement of services in the European Union and beyond its borders is rightly considered to be a potential instrument for regenerating the economy and employment. A more detailed analysis of the obstacles and risks could contribute to balanced development in this sector in an economically and socially sustainable framework of new international agreements.

The temporary physical presence of someone operating on behalf of a business or company that wishes to supply services in another country where he is not a resident, requires deeper analysis for both developing countries and EU Member States.

1. The GATS agreement

1.1 The GATS agreement was negotiated during the Uruguay Round (1986 — 1994) and entered into force in the beginning of 1995, when the World Trade Organisation

replaced the GATT Secretariat. The need for some kind of multilateral rules for trade in services was generally recognised in the 1980s when growth of the service sector (about two thirds of GDP and employment in the EU) and trade in services accelerated and the borderline between goods and services became ever more difficult to define. Increasingly exports of goods require exports of services, such as installation, training and back-up or other services. Also the trend towards more market-based approaches to state or local monopolies, e.g. electricity, telephone and telegraph, urban and rail transport, opened interesting new markets for international trade in services⁽¹⁾. Although the principal aim is the liberalisation of trades in services, the GATS agreement does not force any Member to liberalise to a greater degree than that with which they feel secure and may also limit both the MFN (Most Favoured Nation) principle and National Treatment of Foreign suppliers. The right to regulate and introduce new regulations in the service markets is also clearly stated. No sectors are in principle excluded, except those involving 'the exercise of public authority'⁽²⁾.

2. The modes of supply

2.1 *The logic between the different modes*

2.1.1 According to Article I para. 2. in the GATS agreement 'trade in services' is defined as the supply of a service:

- a) from the territory of one Member into the territory of any other Member;

⁽¹⁾ Refer to the European Economic and Social Committee's activities during the Dutch Presidency in 2004. ESC opinion on the preparation of the 4th WTO Ministerial Conference in Qatar: ESC position, 17 October 2001 (OJ C 36, 8.2.2002 p. 85). ESC opinion on The European Airline Industry: from Single Market to Worldwide Challenges of 26 January 2000 (OJ C 75, 15.3.2000 p.4). EESC opinion on the Green Paper on Services of General Interest of 11 December 2003 (OJ C 80, 30.03.2004 p. 66). EESC opinion entitled For a WTO with a human face: the EESC's proposals of 26 March 2003 (OJ C 133, 6.6.2003 p. 75)

⁽²⁾ These services and their regulation vary from country to country.

- b) in the territory of one Member to the service consumer of any other Member;
- c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

2.1.2 These modes of supply are usually called Modes 1, 2, 3 and 4. Mode 1 is when services are provided remotely (by post, fax, telephone or internet). Under Mode 2, the consumer travels abroad to receive the service (tourism is the most common example); Tourism is the most typical example of Mode 2, Mode 3 is about establishing a commercial presence in another Member (investment) and Mode 4 is when people enter a country (temporarily) to provide a service — either because personal contact with the client is needed or because services must be performed on-site.

2.1.3 Modes 3 and 4 are often closely interlinked. Companies often rotate their senior level personnel and specialists between offices in different countries — this internal mobility is essential to the effective provision of the services they provide. But the provision of services through Modes 1 and 2 can also be facilitated by Mode 4. Thus, for example, business visitors can negotiate and conclude contracts through these modes of supply.

2.1.4 Due to the interlinkages between the modes of supply, the macroeconomic effects — trade creation, growth and employment, competition, better service supply and lower prices for the consumers — of further liberalisation of just one Mode, e.g. Mode 4 — is almost impossible to estimate, as an OECD study on GATS Mode 4 states⁽³⁾. Studies of the trade, growth and employment effects of Mode 4 liberalisation are further hampered by the lack of statistics on temporary movement under Mode 4. The real issue is not the extent of the benefits to be obtained under Mode 4 but rather which benefits may be guaranteed and which negative impacts can be minimised. Many businesses claim that trade has been obstructed by the red tape involved in securing visas and work permits.

2.1.5 GATS Mode 4 covers a very particular form of movement of persons. It has three essential features: 1) it is temporary; 2) it is decided, and its purpose is controlled by the service supplier; 3) it neither defines nor protects the rights of the employees concerned, which may be regulated by any State

of destination that is a WTO Member. Labour migration under GATS Mode 4 is temporary migration at the initiative of the service supplier for the provision of a service. Mode 4 could also apply to situations where the service supplier could oblige an employee to travel beyond his natural boundaries in order to work.

2.1.6 It is important to note that Mode 4 is substantially different from the principle of free movement of labour in the EU/EEA. In the EU it is about the individual's right to choose where to live and work. In the case of Mode 4 it is about the right of a service supplier to enter a country (the EU) for a certain period of time in order to provide a service.

2.1.7 Movement of labour comes primarily under the purview of immigration and labour market policies rather than that of international trade. There is a risk that temporary labour mobility will lead to a situation, whereby under WTO rules labour becomes a commodity. The governing principle in the ILO is that 'Labour is not a commodity'⁽⁴⁾. Mode 4 is about people, human beings. Human rights, workers' rights and working conditions are nevertheless not mentioned in the GATS agreement, but could and should be observed in both Members requests, offers and commitments as the EU and the Member States have done.

2.2 Mode 4 and the Annex on Movement of natural persons supplying services under the Agreement

2.2.1 The link between trade, migration and labour market regulation embodied in Mode 4 is recognised in the GATS Agreement by a specific Annex. Point 2 in this annex states that the GATS shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding permanent migration, residence or employment on a permanent basis. In a footnote to the Annex it is stated that: 'the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific condition'. Finally, the Annex states that countries should remain free to regulate the entry of natural persons into, or their temporary stay in, their territory, (including visa policy) provided that the measures adopted do not have a trade restrictive effect. A visa requirement for certain nationalities is not regarded as having a trade restrictive effect. The annex makes it clear how sensitive an issue temporary mobility is for WTO Members.

⁽³⁾ http://www.oecd.org/document/25/0,2340,fr_2649_34145_31773849_1_1_1_1,00.html

⁽⁴⁾ ILO International Labour Conference, Philadelphia Declaration, 1944

2.3 EU commitments

2.3.1 The commitments that WTO Members have made for Mode 4 differ from those made for other Modes in certain respects, the most important being that they have tended to be made horizontally, applying to all sectors cited in a Member State's list of commitments. This is a reflection of the way that immigration officials regulate temporary migration, with rules applying on the basis of purpose of entry, skills, education and other factors regardless of the sector involved.

2.3.2 Although most countries made commitments for Mode 4 at the end of the Uruguay Round, it is estimated that over 90 % of those commitments apply only to highly skilled workers (senior managers, professionals and specialists with proprietary knowledge) or to business visitors. Even for the highly skilled, most commitments have value only if the service provider is also able to set up a commercial presence in the host country (Mode 3) — so-called 'intra-company transfers'. Very few countries have made commitments in relation to service providers who do not have a commercial presence in the host country — whether they are employees of a firm established overseas, or independent service providers (freelance, individual professionals or entrepreneurs etc). Even fewer have covered what might be considered to be middle or lower skill levels. In fact, most countries have made 90 % of the commitments for highly skilled workers only.

2.3.3 As such, Mode 4 commitments barely touch on the level of activity that could take place, and — indeed — is crucial in certain sectors where Mode 4 delivery is the main mode of supply (e.g. professional services, including health care workers) or where there is no commercial presence (e.g. construction services, computer services requiring on-site presence).

2.3.4 In the Uruguay Round, the EC and its Member States made certain commitments which allow some foreign nationals to temporarily enter the European Union for the purpose of the provision of services. They include commitments made during the extended negotiations on Mode 4 after the end of the Uruguay Round.

2.4 The European Commission divides Mode 4 service suppliers into three broad categories — and other WTO Members use similar ones:

— **Intra-corporate Transfers (ICTs):** An employee of an enterprise who is temporarily transferred from an establishment of that enterprise outside the EU (head office, subsidiary, branch) to an establishment within the EU.

— **Business Visitors (BVs):** A representative of a foreign services supplier who temporarily enters the EU for one of the following purposes: (a) to negotiate the sale of services; (b) to conclude contracts to sell services; or (c) to set up an establishment (subsidiary, branch or office). BVs must not themselves supply services in the EU.

— **Contractual Service Suppliers (CSSs):** This category includes employees of juridical persons (EJP) and, on the basis of the European Commission's new offer, could also include Independent Professionals (IP). EJPs temporarily enter the EU as employees of an overseas enterprise that has obtained a service contract in the EU. IPs are self-employed persons who temporarily enter the EU to fulfil a service contract in the EU that they themselves have obtained.

2.5 EU requests to other WTO Members

2.5.1 The EU made specific requests to increase the level of commitments for Mode 4 to 106 WTO Members, which were modulated to reflect the level of development of the Member concerned and its importance as a trading partner. This reflects the EU's own export interests for this mode of supply. The EU is seeking to bring most major WTO partners up to a similar level of commitment. The following requests were made:

1) **Intra-corporate transfers (ICT):** Allow transfers between affiliated companies of key personnel (managers, executives and specialists) for up to three years and also include short-term training objectives in these agreements.

2) **Business visitors (BV):** transfers for stays of up to 90 days.

3) **Contractual service providers (CSS):** The initial requests were made in relation to employees of juridical persons only. Only certain service sectors were covered (e.g. Professional and business services, environmental services), with different lists of sectors requested of OECD countries and developing countries. In addition, requests under this category have not been made to least developed countries. The requests submitted to WTO partners in January were restricted to Independent Professionals for major trading partners.

2.6 Requests by WTO Members

2.6.1 With regard to negotiations, the European Union received over 50 requests from other Member States to develop Mode 4 at various levels: on the one hand greater transparency regarding commitments was requested, whereas, on the other hand, some requested the abolition of almost all restrictions applicable to most services.

2.6.2 A large majority of the requests have come from developing countries, and for almost half of these developing countries, it consisted in the elimination of all restrictions (which would imply complete free movement of people), to cover lower skill levels, to remove economic needs tests and labour market testing linked to Mode 4. Three countries effectively want us to abolish our visa regime and grant an automatic right of entry and stay. Several want recognition of third country qualifications or the extension of the EU Directives on Mutual Recognition to third country nationals who have obtained their qualifications in the EU.

2.6.3 The Second LDCs Trade Ministers meeting in Dhaka, Bangladesh, 31 May — 2 June 2003 stated in its Dhaka Declaration: para. 15 iv.: 'Free access to developed country markets for temporary movement of natural persons, particularly unskilled and semi-skilled service providers, under Mode 4 by inter alia recognising professional qualification, simplifying visa procedures and without asking for Economic Needs Test'.

3. EU offer

3.1 Significant improvements are being offered in a number of areas: for **contractual service suppliers** (CSS), commitments have been agreed on 22 sub-sectors (mostly professional and business services), as well as another four sectors for independent workers, for a stay of up to six months. For the same core group, the EU has committed itself not to apply Economic Needs Tests (ENT), but, instead, to introduce a numerical cap on the number of service suppliers covered by this commitment. The level of the cap and the modalities of its application still need to be determined. Furthermore, for young people, training for a maximum period of 12 months could be foreseen for intra-company transfers. This EU offer is unquestionably amongst the most ambitious and proactive offers made.

4. Third country offers

4.1 Only a few (38) WTO Members have made preliminary offers for further liberalisation of trade in services within the last deadline laid down in the Doha Declaration, despite the fact that this covers 91.6 % of world trade. The level of offers for both industrialised and developing countries remains relatively low and limited, even in terms of quality. Nevertheless, it should be borne in mind that certain countries, i.e. India, the Philippines, Thailand, and Indonesia, reformulated their requests on the basis of the new EU offer.

5. Temporary stays, the labour market and social cohesion

5.1 The problems relating to Mode 4 cannot be restricted to trade. They also concern broader migration and labour policies. The world of migration includes the subset of temporary migration, which in turn includes migration for purposes of employment. The GATS Mode 4 constitutes another subset.

5.2 However, Mode 4's scope is not clearly defined. It is necessary to clarify the link between temporary migration for employment purposes and temporary migration to establish a commercial presence. But, above all, the term 'temporary' must be defined as it could mean anything from a few months to over five years. In addition, the types of employment covered have not yet been defined. Furthermore, the EU (Treaty) and the WTO do not apply the term 'temporary migration' in the same way.

5.3 It is clear that Mode 4 should only apply to a restricted stratum of highly-qualified personnel and independent contractor professionals. However, if, in the future, the application of Mode 4 were to be extended to other employment categories, a far more specific and restrictive definition of 'temporary' would be required, as would a more precise definition for 'service suppliers'. In any case, and bearing in mind that trade agreements are not ideally suited to dealing with labour laws, an element of clarity could be brought to Mode 4 by applying the terms of the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up⁽⁵⁾. The latter is in itself a legal reference point. The Charter of Fundamental Rights adopted in Nice is of primary importance to EU Member States, especially since it has now been incorporated in the Constitutional Treaty.

5.4 This would be very important for many independent contractor professionals, as well as for all issues relating to pension schemes and fighting unemployment. Clearly, emigration must be managed at national level and not by the WTO. Similarly, certain labour-related aspects, including human rights and social security, should be dealt with at an international level by organisations such as the ILO.

6. Conclusions and recommendations

6.1 The European Economic and Social Committee recognises the importance of a further liberalisation of the global trade in services for economic growth in both developing and industrialised countries. Nevertheless, there is still no impact analysis for the real social consequences and the labour markets in the service supplier's country and the host country.

⁽⁵⁾ http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN

6.2 The EESC also recognises the importance of the right of WTO Members to regulate and to introduce new regulations on the supply of services.

6.2.1 The EESC supports the preliminary offers for a further liberalisation made by the EU under the GATS Mode 4, but conditional on the observance of core labour standards, national labour law and existing collective agreements in host countries. The Committee approves and welcomes the fact that the Commission has included workers' rights in its list of commitments.

6.2.1.1 The proposal to add a category of Intra-Company Trainees to the offer might be of great interest both for EU multinational companies and for young managers and companies in third countries and is thus welcomed. Needless to say, the 'training' nature of these relationships must be clearly defined to avoid the risk that they might translate into underpaid work in the service sector that would be in breach of national training regulations — whether in the form of legislation or collective agreements — or of international labour standards.

6.2.2 The EU also proposes new commitments concerning Independent Professionals as Contractual Service Suppliers, although only in a number of sub-sectors and for highly qualified experts⁽⁶⁾.

6.2.3 The EESC underlines the importance of taking measures by the Members to enforce the protection of temporary workers and to guarantee non-discrimination and the introduction of proper surveillance mechanisms, e.g. along the principles of ILO Convention No. 95 concerning the protection of wages.

6.2.4 In particular, the most recent enlargement or the forthcoming enlargement(s) of the EU with countries where collective agreements are rare will require the introduction of equally effective control mechanisms.

6.2.5 The EESC considers that in order to further liberalise trade in services, the EU should first take steps to:

- 1) specify that the Directive on Posted Workers is also the basis for the temporary movement of workers;
- 2) clarify which legislative reference framework is to apply to the liberalisation of services within the EU internal market (see draft Directive on Services in the internal market),

⁽⁶⁾ The UNICE report on Cancun, Moving Forward Together, July 2003, defines Mode IV as 'temporary movement of key business personnel'.

which, in recent months, has been at the centre of a particularly contentious debate;

- 3) establish a clear distinction between services of general interest (including health, education, energy, gas); economic and non-economic services; services for commercial and non-commercial purposes, and services of another nature.

6.3 The EESC is in principle favourable to the proposal made by the European Service Forum to create a GATS Permit. This would make the movement of service providers both from and to the EU smoother and also make monitoring of the use of Mode 4 more transparent.

6.4 For many developing countries the risk for a 'brain-drain' is a reality. Many developing countries face a shortage of e.g. nurses, as they move to developed countries where there are shortages of skilled personnel. The EESC proposes that the commission and the MS should develop rules or practices (as the health sector in the UK has done, particularly in the nursing profession, where a code of ethics for recruitment polices has been drawn up) to avoid a situation whereby developing countries lose their competent and specialised workforce and thus their ability to take care of the needs of their own populations.

6.5 The EESC urges the EU and the MS not to accept any widening of Mode 4 to semi-skilled or unskilled workers for the time being. This would effectively lead to a situation, in which the basic principle of the International Labour Organisation (ILO), that 'labour is not a commodity' could be jeopardised. Semi- and unskilled foreign workers are almost always in a weak position in the labour market. Foreign managers and experts or highly skilled independent professionals are usually in a strong position and are well protected.

6.6 The EESC cannot accept that the temporary movement of workers, *de facto* temporary migration, would primarily be regulated through the WTO and the GATS agreement, without any guarantees for human rights or the observance of core labour standards, such as non-discrimination. A functioning cooperation between WTO and at least the ILO, the International Migration Organisation (IMO) and the UN to protect the rights of temporary migrants must be a prerequisite for further enlargement of the scope of the Mode 4 in the WTO. In this respect, the ILO's role would be enhanced as a tripartite focal point for dialogue, and as a possible coordinating body.

6.7 The EESC believes that European Governments should reconsider ratification of the UN's International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which came into force in July 2003. That Convention defines rights of temporary migrants; for example, 'specified-employment workers'. Even in the absence of ratification, as a set of internationally recognised standards, this Convention should be used to guide policy (⁷). ILO Convention No. 146 has been ratified by six EU and accession states (before and after enlargement) and four other European States. Its provisions should be applied, along with those of Recommendation No. 151. The relevant Articles of the European Social Charter (Council of Europe) must be applied. The measures taken by the EU under GATS Mode 4 must be compatible with those standards, especially those to which EU Members have adhered.

6.8 The EESC welcomes the European Parliament GATS resolution (12 March 2003), especially points 5, 10 and 11, and urges the Commission and the Member States to take it into account in the GATS negotiations.

Point 5: Recalls that the GATS is a voluntary agreement and that its principles do not impose either privatisation or deregu-

lation, nor do they prescribe a particular degree of liberalisation as such; insists, however, that developing and least developed countries should not be pressured to liberalise services, in particular public services.

Point 10: Welcomes the offer to grant developing countries, in particular, better opportunities to supply services to the EU market through temporary cross-border movement of qualified personnel, but insists that negotiations must ensure protection of cross-border workers against all forms of discrimination; recalls that in all these cases, EU and national working conditions, minimum wage requirements and any collective wage agreements must continue to apply, regardless of whether or not the employer is registered in an EU Member State.

Point 11: Stresses that 'commercial presence' (investment) must continue to be governed by domestic tax, social and other regulatory measures; insists on the right to make foreign commercial presence conditional on respect for the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the (in summer 2000) revised OECD Guidelines for Multinational Enterprises.

Brussels, 8 June 2005

The President
of the European Economic and Social Committee
Anne-Marie SIGMUND

⁽⁷⁾ For example, the GATS agreements make no mention of the rights of spouses or children.