

SECOND ESF POSITION PAPER ON DOMESTIC REGULATION

Introduction

1. This Position Paper updates and reinforces the European Services Forum's Preliminary Discussion Paper on Domestic Regulation dated 5 June 2001. The ESF's Preliminary Discussion Paper remains valid and continues to represent the views of the ESF on all the subjects that it covered, including:
 - the significance of domestic regulation;
 - general issues (the provisions of the GATS; how widely should GATS Disciplines apply?);
 - transparency;
 - necessity;
 - proportionality; and
 - consistency with GATS requirements on market access and national treatment.
2. The ESF continues to support fully the views expressed in the Preliminary Discussion Paper of 5 June 2001. However, it is also aware that the Working Party on Domestic Regulation has had a number of discussions on domestic regulation between mid-2001 and the end of 2004, primarily on the basis of various papers submitted by WTO Members. The ESF considers that it is timely to reiterate its principal views on the issues under debate. The ESF understands that transparency has been the principal subject on which the Working Party's has focussed. This Position Paper accordingly focuses similarly on transparency although the ESF also takes the opportunity of recalling and reiterating its views on other important aspects of the domestic regulation debate.
3. However, before commenting on transparency and other disciplines, there are three further general introductory remarks which the ESF would wish to make.
4. First, ESF believes that good quality regulatory regimes, which meet the sort of criteria outlined in this paper, are very much in the interest of both business and consumers. It is not in the interest of service suppliers to have, unpredictable, inadequate or ineffective regulatory systems in sectors where appropriate, proportionate and proper prudential regulation is needed to ensure the orderly operation of the sector. At the same time, regulation needs to avoid the pitfall of excess (e.g. when it can take months to register a new company), or regulating activities which function satisfactorily without such regulation, as this serves to work against the interests of both service suppliers and their customers. These basic principles of good quality regulation should also be observed by Governments when exercising their legitimate right to regulate the provision of public services.
5. Second, good quality regulation of the sort described in this paper is as important and relevant to both local suppliers of services as it is to suppliers from overseas. Governments which wish to attract foreign investment in services will significantly improve their chances of success if they can ensure the right regulatory environment is created.
6. Third, the ESF believes that countries, which operate high quality regulatory regimes, should be encouraged to share their knowledge and experience with other countries. Such capacity building should help to promote the wider proliferation internationally of regulatory regimes of quality.

Transparency

7. Article III of the GATS addresses the issue of transparency. Article III(1) provides for the prompt publication of measures affecting trade in services. Articles III(3) and III(4) provide for notification to the GATS Council and for prompt responses to (and enquiry points for) WTO Member Governments.
8. Where the supply of services is subject to any kind of domestic regulation, a transparent and fair regulatory system is a precondition for the liberalisation of trade in services.
9. The ESF remains of the view that it is crucial that transparency disciplines should apply to all service sectors, irrespective of whether or not a WTO Member has undertaken commitments. Transparency helps to ensure that the process of making and administering laws and rules is subject to public scrutiny and comment, thus making it more likely that laws and rules meet the standards of other GATS disciplines (legitimacy, necessity, proportionality and sectoral disciplines), where appropriate.
10. In an annex to its Preliminary Discussion Paper of 2001, the ESF made a proposal for a transparency framework. This proposal set out the ESF's core belief that a transparent and fair regulatory system is important for every services sector and that WTO negotiations should seek agreement on certain general principles in the area of standard-setting, regulatory application processes and in relation to judicial, arbitral or administrative tribunals. The ESF remains of the view that its detailed proposals are still valid and therefore attaches a further copy of the annex containing the proposal (Annex 1).
11. The ESF believes that the transparency procedures set out in this proposal should apply at both national and sub-national levels. If a WTO Member's national or sub-national administration believes that it cannot meet these standards fully, the onus should be on that WTO Member to explain the reasons for such a belief and to make proposals for overcoming the difficulties.
12. In reiterating its proposal for a transparency framework, the ESF acknowledges that in some sectors it may also be appropriate to develop additional transparency requirements, going beyond any general transparency requirements that are negotiated and agreed as basic GATS disciplines.

Disciplines other than Transparency

13. Providers of internationally traded services seek regulatory environments which not only meet accepted criteria of transparency but also criteria of legitimacy, necessity, proportionality and consistency with GATS requirements on market access and national treatment.
14. In addition to transparency, the other areas identified in the previous paragraphs are still viewed by ESF members, though to varying extents, as being of considerable importance to ensuring that services markets are subject to appropriate and predictable domestic regulatory rules. In the expectation that the Working Party will return in due course to more detailed debate on these other issues, the ESF takes this opportunity to re-state its views on necessity, legitimacy and proportionality.

a) Necessity

15. Article VI(4) of the GATS provides that any necessary disciplines developed relating to qualification requirements and procedures, technical standards and licensing requirements, should not constitute unnecessary barriers to trade in services and shall aim to ensure that they are:
- based on objective and transparent criteria, such as competence and the ability to supply the service;
 - not be more burdensome than necessary to ensure the quality of the service, and
 - in the case of licensing procedures, not in themselves be a restriction on the supply of a service.
16. The ESF remains of the view that, following the development of horizontal transparency disciplines, it would be beneficial for service suppliers if WTO Members were then to negotiate and agree appropriate necessary disciplines in all the areas covered in GATS Article VI(4). The ESF acknowledges that a horizontal approach might need to be supplemented by appropriate sectoral disciplines reflecting the different characteristics of individual sectors.

b) Legitimacy

17. The ESF understands and accepts that there has been little obvious evidence of support amongst WTO Members for preparation of a list of legitimate objectives which domestic regulatory regimes should satisfy. While acknowledging this, the ESF would repeat its previously stated view that there should be no attempt to establish a list of non-legitimate objectives: such a list would inevitably be long and could play into the hands of those WTO Members who would prefer not to focus on legitimacy at all.

c) Proportionality

18. As previously stated, to the extent that proportionality is considered useful, the WTO should focus on how to make the principle operational. The proportionality principle could be developed in due course into a form of guidance to regulators to assist them in their domestic regulatory function. An overarching principle should be that domestic regulatory measures should be proportionate to the objectives pursued. This principle may need to be interpreted with a degree of flexibility, but central to it would be the concept that domestic regulatory measures should be 'not more burdensome than necessary'.
19. The ESF also reiterates its view that the following general principles ought to apply:
- Technical standards, and licensing and qualification requirements and procedures, should not create unnecessary barriers to trade. In determining whether a measure operated by a WTO Member is in conformity with this, account should be taken of internationally recognised standards of relevant international organisations applied by that Member.
 - The regulator should act independently, i.e. the decision of and the procedures used by regulators should be impartial with respect to all market participants.

d) Consistency with GATS requirements on market access and national treatment

20. The ESF recognises that it is probably unrealistic to expect the WTO to develop detailed universally applicable horizontal disciplines, at least within an imminent timescale, that comprehensively address the aforementioned areas of necessity, legitimacy and proportionality.

21. Indeed, a sectoral approach may be preferred in particular sectors, following the example of the approach used in the GATS Annex on Telecommunications and the Basic Telecommunications Reference Paper. The ESF therefore continues to expect that particular sectors will require specific principles and features to be elaborated, relevant to:
- commitments to market access and national treatment in those sectors; and
 - 'best practices' which may take the form of additional commitments under Article XVIII of the GATS.

Conclusions

22. The ESF's Preliminary Discussion Paper remains valid and continues to represent the views of the ESF on all the subjects that it covered. Subject to that, the ESF reiterates its view that services markets, if they are to be effectively liberalised, must be subject to systems of regulation which:
- are necessary, reasonable, proportionate, transparent and neutral;
 - are administered in a user-friendly way towards new market entrants, are conducive to market entry, and facilitate innovation;
 - are technologically neutral;
 - aim at reasonable equivalence of results in practice in different markets;
 - are funded by administrative fees that seek to recover no more than the administrative costs of granting or renewing a general authorisation or licence, and, where appropriate, the costs of the competent authority in supervising the regulated entity;
 - pave the way for harmonised international standards.
23. Such systems of regulation are likely to require a combination of horizontal and sector-specific disciplines within the GATS framework. In the short term, the ESF regards the goal of WTO horizontal disciplines on transparency as achievable; and this Position Paper accordingly restates and updates the types of horizontal detailed provisions that the ESF considers are needed to achieve transparent and fair regulatory regimes in the areas of standard-setting and regulatory application processes and in relation to judicial arbitral or administrative tribunals.
24. While such transparent rules and processes are a crucial element of fair and predictable domestic regulatory regimes, they need to be supplemented in due course by other disciplines, whether horizontal and/or sector-specific, that develop rules, as appropriate, in the areas of necessity, legitimacy and proportionality. Here, too, this Position Paper restates and updates certain considerations which the ESF believes to be important.
25. The ESF remains ready to offer comments on specific proposals that may be developed on the subject of domestic regulation, and, in particular, to offer its views to the WTO Working Party on Domestic Regulation in relation to any particular proposal on which the Working Party may wish to seek the ESF's opinion.

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ESF PROPOSAL FOR A TRANSPARENCY FRAMEWORK

The ESF proposes a Framework for the ongoing negotiations in the WTO regarding transparency in government regulation of services. Its purpose is to provide more specific recommendations for how governments should pursue GATS transparency issues in forthcoming negotiations.

Improving General Transparency Disciplines

A transparent and fair regulatory system is important for every service sector. Pursuant to GATS Articles XVIII and XIX, general commitments should be sought in three areas: (A) Standard-setting, (B) the Regulatory Application Process, and (C) Judicial, Arbitral, or Administrative Tribunals.

A. Standard-setting

Negotiators should seek agreement on the following general principles:

1. All new (or revised) regulations should be available for public comment prior to adoption with adequate time for comments by service suppliers operating in (or seeking to operate in) the national market.
2. To facilitate the notice and comment process, a public hearing should, when necessary and appropriate, be held to receive private sector input regarding proposed regulations.
3. Government agencies should address the comments received from interested parties.
4. New regulations should not be made effective until market participants have a reasonable period of time to become familiar with their contents and to take steps to implement them, except in emergency situations.
5. New regulations should be drafted so that they are clear and understandable.
6. Any hearings by government-sponsored advisory committees should normally be open to the public. When regulators or advisory committees hold private meetings that relate to pending regulatory proposals, a report of the substance of the meeting should be made available promptly to the public.

B. Regulatory Application Process

Negotiators should seek agreement on the following general principles:

1. All current regulations and licensing criteria should be publicly available and accessible in writing and through electronic media so that all market participants have easy access to such material. Licence applicants should be provided with a written statement setting out fully and precisely the documents and information the applicant must supply for the purpose of obtaining authorisation.
2. Regulators should establish a mechanism to respond to inquiries on rules and regulations from service suppliers. Enquiry points for the public should be provided.
3. Regulatory interpretations and the grants of regulatory exemptions should be made available to the public on a prompt basis (subject to business confidential rules).
4. When an examination is required for the licensing of an individual, regulators should schedule such examinations at reasonably frequent intervals. Examinations should be open to all eligible applicants, including foreign applicants.

5. Actions on any application for a licence should be taken within a reasonable period of time. Licences should enter into force immediately upon being granted.
6. No service supplier should be denied a license, and no new service should be prohibited, on the basis of any factor not identified in the published written regulations or interpretations.
7. When an application for a license or other regulatory status is denied, regulators should provide a detailed explanation for that action, including the particular requirements that were not satisfied. Applicants should be given the opportunity to resubmit applications or to file additional or supplementary material.
8. Administrative fees charged in connection with licences should be fair and reasonable, should not act to unreasonably limit licensing requests or the introduction of new products and service, and should seek to recover no more than the costs of the competent authority in processing the licence application and thereafter supervising the regulated entity.
9. Confidential information provided by an applicant should not generally be disclosed. Disclosure of such information should occur only in accordance with established rules permitting public disclosure.

C. Judicial, Arbitral, or Administrative Tribunals

Negotiators should seek agreement on the following general principles:

1. Service providers should have an opportunity to file a complaint about inconsistent enforcement between foreign and domestic providers.
 2. Service providers should have an opportunity to file a complaint about arbitrary regulatory action against those who give comments in regulatory hearings.
 3. Applicants should have an opportunity to file a complaint in the event that a license application is refused review or a decision is delayed by the relevant authority.
 4. Applicants should have an opportunity to file an appeal in the event that a license application is denied. Appeals should be decided within a reasonable period of time. In the event of the appeal being dismissed by the regulatory authority, the regulatory authority's decision should be capable of being reviewed by judicial/administrative courts or by arbitration.
 5. In any regulatory enforcement proceeding, the service supplier should be notified in a timely manner about the proceeding and should be given an opportunity to be heard and to submit documentary evidence. Subjects of regulatory proceedings should have the right to legal counsel of their choice. The subjects of regulatory proceedings should be permitted access to evidence.
 6. The burden of proof to demonstrate that a licensed market participant has not conducted its business in accordance with the relevant law should lie with the regulatory authorities.
 7. Disciplinary actions should not be taken on violations of regulatory standards that were not in effect at the time the relevant activity took place.
 8. Sanctions by a regulatory authority should not be imposed in an unfair or discriminatory manner. Regulators should treat similarly situated persons and entities in a similar manner.
 9. The subjects of any regulatory enforcement proceeding should have an opportunity to appeal any enforcement finding or sanction imposed.
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List of ESF Members Supporting the
2nd Position Paper on Domestic Regulation – 12 April 2005

1. Accenture
2. Architects' Council of Europe –ACE
3. Association of Commercial Televisions – ACT
4. AXA
5. Barclays PLC
6. British Telecommunications plc
7. Bundesverband des Freien Berufe – BFB
8. Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
9. Confederation of British Industry - CBI
10. Comité Européen des Assurances - C.E.A.
11. European Council of the Liberal Professions – CEPLIS
12. Confédération Fiscale Européenne - CFE
13. Clifford Chance
14. Comité de Liaison des Géomètres Européens – CLGE
15. Commerzbank AG
16. Deutsche Telekom AG
17. DHL Worldwide Network SA
18. EDS Europe, Middle East & Africa
19. Ernst & Young
20. Espacio y Entorno (Architect)
21. Eurelectric - Union of the Electricity Industry
22. EuroCommerce
23. European Association of Cooperative Banks – EACB
24. European Banking Federation – FBE
25. European Community Shipowners' Associations – ESCA
26. European Express Association – EEA
27. European Federation of Engineering and Consultancy Association – EFCA
28. European Film GATS Steering Group
29. European International Contractors - EIC
30. European Public Telecom Network – ETNO
31. European Retail Round Table – ERRT
32. European Savings Banks Group – ESBG
33. Federation of European Consultancies Associations – FEACO
34. Fédération des Experts Comptables Européens – FEE
35. Fédération de l'Industrie Européenne de la Construction – FIEC
36. Federation of Professional Industry and Services Organisations in Italy - FITA
37. France Telecom
38. Free and Fair Post Initiative
39. Gide Loyrette Nouel
40. Herbert Smith
41. IBM Europe, Middle East & Africa
42. International Federation of the Phonographic Industry – IFPI
43. International Financial Services, London - IFSL
44. KPMG
45. La Poste
46. Lloyd's of London
47. Metro AG
48. Mm02
49. Oracle Europe, Middle East & Africa
50. Portugal Telecom
51. PostEurop
52. Poste Italiane S.p.A.
53. PricewaterhouseCoopers
54. Prudential
55. PT - Palvelutyöntajat ry - Employers' Confederation of Service Industries, Finland
56. Royal Ahold NV
57. Royal Bank of Scotland – RBS
58. Siemens AG.
59. Svenskt Näringsliv (Confederation of Swedish Enterprise)
60. Telecom Italia
61. Telefónica SA
62. TPG
63. TUI A.G.
64. UNICE
65. UNICE WTO Working Group
66. Universal Music International
67. UNIQA Versicherungen AG
68. Veolia Environnement
69. Vodafone
70. White & Case LLP