

**FOURTH ESF POSITION PAPER ON
THE TEMPORARY MOVEMENT OF PERSONS**

I Executive Summary

1 The ESF welcomes the suggestions that have been made by the European Communities (and a number of other WTO Members, including several large developing countries) in favour of a common approach to scheduling Mode 4 commitments. Nevertheless the ESF is very disappointed that the quality of WTO Members' initial offers on Mode 4 of the GATS generally remains so limited. The ESF therefore calls on the European Commission, as a matter of urgency, to persuade the EU's trading partners (in particular other Quad country members) to make broader and deeper commitments on Mode 4 to deal with the temporary movement of highly skilled "key business personnel".¹

2 The remainder of this paper, which is focused on the needs of key business personnel, restates the ESF's views about why further liberalisation of Mode 4 is necessary. In particular:

- Further liberalisation will help to make a reality of the *development* focus of the current round of multilateral negotiations - it is in the EU's strategic interests to make progress in this area, to help keep European services internationally competitive;
- Several large developing countries have adopted a more realistic approach toward Mode 4 liberalisation and there has been growing interest among inter-governmental and other institutions to identify opportunities for making progress - the ESF makes specific recommendations to help policy makers and trade negotiators converge on possible solutions;
- The business case for liberalisation of Mode 4 remains strong;
- To assist trade negotiators, the ESF has agreed criteria for the assessment of Mode 4 commitments and Members' offers;
- The ESF recommends specific measures to secure greater certainty and predictability in Members' commitments, to improve procedures for obtaining work permits and visas and to obtain greater market access under Mode 4 – these are set out in paragraphs 20 and 23 below.

II Context

3 Over the past 5 years the ESF has been calling for further liberalisation of measures affecting the temporary movement of specialist, technical or managerial persons. As economic and technological developments continue, demand for key business personnel is increasing. A global market for these highly skilled people is developing. Businesses need to move their people around more countries, for shorter periods, at shorter notice, including for the purposes of training and development while providing a service. Yet the *temporary* movement of persons remains regulated largely by measures that are designed to control permanent migration. Businesses arranging an intra-corporate transfer, a business visit or an assignment overseas continue to face complex, cumbersome and time-consuming procedures. They often encounter restrictions that are unclear and capable of arbitrary or inconsistent interpretation.

Development significance of Mode 4

4 The reduction or removal of these barriers to the supply of services is of interest to developing as well as developed countries. Yet progress towards liberalisation of Mode 4 under the General Agreement on Trade in Services (GATS) has been limited so far. Although it may be argued that GATS commitments under Mode 4 are not a good indicator of the actual level of

¹ That is to say, executive, technical and managerial personnel.

access provided to service suppliers, since they generally do not reflect the current migration regime of a WTO Member but rather a baseline of practice, GATS commitments do help to provide certainty and predictability which are so important for business planning and investment decision-making. They guarantee a minimum level of treatment from which a WTO Member may not deviate without compensating other Members.

5 Depending on the categories of person and the levels of skill in issue, the economic (and other) benefits from further liberalisation of the temporary movement of persons could be significant, including effects on merchandise trade and trade in services in other modes of supply. The benefits of further liberalisation include increasing global wealth, greater specialisation and more efficient allocation of resources, improved technology transfer, more innovation and lower prices for consumers and clients.²

6 It is important, however, to be realistic about the development gains that have been claimed for liberalisation of Mode 4 which turn on the important issue of skill level. These claims are setting high expectations from some developing countries. It has been suggested,³ applying a general equilibrium model to examine the effects of increasing developed countries' quotas on temporary inflows of both skilled and unskilled workers, that if quotas were increased by an amount equal to 3% of developed countries' labour forces, there would be an increase in world welfare of \$US 156bn per year. The gains, to both developed and developing countries, owe more to greater low-skilled mobility than to high skilled mobility. Most of the potential gains from the movement of persons referred to in that study cover all skill levels and are not limited to services sectors. They therefore cover a broader scope of temporary movement than covered by the temporary movement of natural persons under Mode 4 of the GATS. The ESF wishes to emphasise this point because it underlines the need for a realistic and practical approach to Mode 4 - which several large developing countries (including India) are showing.

Inter-governmental and other interest in Mode 4

7 The ESF welcomes the growing interest from a number of international bodies (including the Global Commission for International Migration, International Migration Organisation, OECD, United Nations Commission for Trade and Development, the World Bank, and the World Trade Organisation), and from a number of WTO Members in liberalisation of Mode 4. This interest has helped to provide opportunities for exchanges of views between a wide range of stakeholders on matters that are engaging the attention of trade, migration, justice and home affairs authorities.

8 The ESF was pleased that in 2001 many WTO Members submitted various horizontal proposals on temporary movement of persons;⁴ and the Doha Ministerial Declaration of that year recognised the potential of these proposals for achieving the developmental objectives of the round.

9 In 2003 the ESF also welcomed the EU's initial offer on services and the leadership position it took on Mode 4 (including the proposal to extend the intra-corporate transfer commitment to trainees, which remains an important proposal).⁵ Although the ESF had concerns about some aspects of the EU's offer in relation to movement of persons, they hoped the offer

² See, for example, *World Trade Report 2004* (WTO) at pp 47-68.

³ Winters et al, *Negotiating the Liberalisation of the Temporary Movement of Natural Persons* (2002), University of Sussex Discussion Papers in Economics.

⁴ ESF Third Position Paper on Temporary Movement of Key Business Personnel (2001). The text of this and other ESF position papers is available at www.esf.be

⁵ European firms with global operations (as well as firms that take decisions globally about brand and knowledge management issues) need to be able to deploy the knowledge and skills of their people across all levels of their organisations. These firms view workforce mobility as one element of an effective organisational development and Human resource strategy, as well as a strategic career development tool. A commitment for training and development also reflects changes in the way in which, for example, professional services firms and IT and management consultancies equip their people with the necessary skills and expertise to develop their potential. These firms rely increasingly on learning by doing under supervision, working with client service teams and interacting with the client's people on the ground. Gaining exposure to different ways of working, different local commercial and regulatory constraints and diverse cultural traditions can be an important element of professional and personal development. In competitive labour markets the "war for talent" requires firms to offer international experience to recruit, motivate and retain the brightest and the best.

would act as a catalyst for a dynamic negotiation, the outcome of which could enhance the EU's international competitiveness and bring other, broader benefits to WTO Members.

10 However, based on a review of the initial negotiating offers that are publicly available (assessed against the criteria we mention below),⁶ the ESF is very disappointed that the range and quality of Members' Mode 4 offers generally is so limited. Although there are some helpful features of the offers on Mode 4 that have been submitted by India, New Zealand, Norway, Singapore and Switzerland, the ESF is particularly disappointed that neither Australia nor the United States have proposed any extension of their Mode 4 commitments, and the offers from Brazil, Canada, Hong Kong China and Japan are rather weak.

11 **The ESF therefore calls on the European Commission, as a matter of urgency, to:**

- **persuade its trading partners (in particular other Quad country members) to make broader and deeper commitments on Mode 4, with the objective of securing greater certainty and predictability in Members' commitments;**
- **improve procedures for obtaining in a faster manner work permits and visas for the temporary movement of key business personnel, using IT solutions wherever possible and backed up by appropriate enforcement mechanisms.**

12 The ESF welcomes suggestions in favour of a common approach to scheduling Mode 4 commitments that have been made by:

- the European Communities (and Bulgaria, Canada and Romania);⁷
- a group of developing countries (Argentina, Bolivia, Chile, China, Columbia, India, Mexico, Pakistan, Peru, the Philippines, Thailand and Uruguay);⁸

These initiatives could help to generate more and better quality Mode 4 offers.

III Business case

13 Patterns of international labour mobility are changing across a wide range of services sectors and affect multinational firms as well as contract service suppliers and independent professionals. They are being driven by business development opportunities in emerging markets, the growth of global business networks (operating through branches, subsidiaries, joint ventures, strategic alliances and operating agreements), advances in Information and Communications Technology (ICT) and the growth of outsourcing. The growth in temporary movement of key business personnel is also being driven by the difficulty of attracting employees to work for lengthy periods outside their home country and by the need to train and develop more internationally experienced workforces: these are the "key business personnel of the future".

14 While business activity operates increasingly in a borderless environment, government measures that regulate the movement of persons are lagging behind the development of cross-border trade in services. Barriers to the movement of persons (which are often linked to onerous local regulatory and licensing requirements as well as the recognition of professional qualifications – with which this paper is not concerned) cause particular problems for services providers.

15 During the Uruguay Round and afterwards in the course of the extended negotiations on movement of persons following the conclusion of the GATS in 1995, only a relatively small number of WTO Members made GATS commitments under Mode 4 with regard to Market Access (Article XVI), National Treatment (Article XII) or for additional reasons (Article XVIII). These commitments are:

⁶ See Para 18.

⁷ See "Mode 4 – A Common Approach to Scheduling" (TN/S/W32, 18 February 2005).

⁸ See "Categories of Natural Persons for Commitments under Mode 4 of GATS" (TN/S/W31 2005, 18 February 2005).

- **uneven in sectoral coverage** (many Members have not scheduled accounting, legal or health services, for example);
- **subject to inappropriate conditions** (often relating to functional or hierarchical criteria, length of stay, labour market and economic needs tests, with unclear or inconsistent criteria and often not related to *temporary* movement);
- **expressed in unclear and inconsistent terms** – despite WTO scheduling guidelines there is no uniformity of definition of types and categories of personnel, leading to arbitrary and discriminatory treatment by immigration and consular officials.

16 Barriers to the temporary movement of persons apply across all European services sectors to a greater or lesser degree and the ESF has highlighted examples of the problems to which these barriers can give rise in a previous paper.⁹ They apply in particular in the business advisory and professional services sectors, the Information and Communications Technology sectors, as well as construction, financial services, tourism and transport services sectors. The ESF continues to believe that the problems that these and other sectors face could, and should, be addressed by WTO Members offering to make broader and deeper commitments to existing Mode 4 commitments and by the making of new ones.

IV Assessment of commitments

17 The ESF recognises that a number of public policy objectives have to be considered when assessing existing commitments on Mode 4, as well as proposals to amend them or introduce new ones. These objectives appear to conflict. On the one hand trade and labour departments want open and flexible arrangements that can adjust to the dynamics of international trade and changes in labour markets. On the other, immigration departments (which have to administer the arrangements in practice) want rules of sufficient specificity (for example, to guard against the risks of overstay and abuse) as well as discretions to cater for hard cases or unforeseen circumstances. In addition, at a time of heightened sensitivity to international security, appropriate measures need to be available for immigration, justice and home affairs departments to maintain effective border controls. Mode 4 commitments therefore need to balance clarity, certainty and predictability of outcome with public policy considerations affecting the movement of people generally.

18 The ESF considers that Mode 4 commitments, and Members' offers, should be assessed against the following prioritised criteria, covering the extent to which they provide:

- **clear and realistic definitions** of the categories of person to which the commitments are intended to apply (and avoid unnecessary or undesirable restrictions); and, where quantitative restrictions or economic needs tests (ENTs) apply, they specify clear, transparent criteria and any other relevant information;
- **transparency of information** needed from service suppliers **and of the procedures** to be applied for the grant of work permits, visas or other forms of authorisation;
- **rapid authorisation** for temporary entry without unnecessary, complex or burdensome requirements (subject to appropriate protections such as rights of appeal against refusal and sanctions to guard against the risk of abuse);
- **improved market access** for service sectors in high demand (such as certain professional, computer and related services, and other business services).

V ESF recommendations

19 The ESF calls on WTO Members to make commitments on market access and national treatment under Mode 4 for "key business personnel" (specialist, technical and managerial

⁹ Second Position Paper on the Temporary Movement of Key Business Personnel (2000), at paras. 13-20.

personnel). Secondly, the ESF looks to WTO Members to provide arrangements which enhance the effectiveness of those commitments, as summarised in paragraph 23 below.

Market access and national treatment

20 The ESF recommends that WTO Members should submit offers which, at a minimum, embody the following features:

- **greater uniformity in the definitions and scope of categories of personnel in horizontal commitments and durations of temporary stay of personnel to which commitments relate;**
- **improved commitments for intra-corporate transfers (including transfers for training and development),¹⁰ contract service suppliers,¹¹ independent professionals and certain other specific categories;**
- **in relation to economic needs tests (ENTs), numerical ceilings, quotas or other quantitative restrictions, clear and published criteria applying the tests and specifying procedures governing the duration, administration and review of the tests¹² - in any event, ENTs should not apply to intra-corporate transfers;**
- **improved sectoral commitments which align with the principles embodied in horizontal commitments – priority sectors for European services suppliers are: Business Services (professional services: architectural and engineering services), Computer and related services, Communication services (postal and telecommunication services), Construction and related Engineering services, Distribution services (retailing), Environmental services, Financial services, Other business services (management consulting services and services related to management consulting), Tourism (tourist guide services) and Transport services (maritime transport services).**

21 The ESF has considered suggestions for common formatting of GATS Mode 4 commitments, including the European Communities' preference for scheduling commitments with reference to category of service supplier – which the ESF shares – rather than, for example, scheduling commitments with reference to general requirements for entry with no specific reference to particular categories of service supplier or job type. A common approach to scheduling could help to improve the clarity of existing and future Mode 4 commitments, improve transparency and enable more realistic comparative assessments to be made between WTO Members' commitments. The ESF therefore supports the suggestion (it is put forward as no more than a non-binding tool to aid negotiation, but is no less important for that reason) that WTO members:

- schedule WTO commitments on Mode 4 according to common categories of service supplier;
- use similar terminology for each main category of service supplier (namely intra-corporate transferees, business visitors, contractual service suppliers, independent contractors and other categories not covered by these three categories to deal with specific cases, such as foreign correspondents and ships' crews);

¹⁰ For the reasons given in para 9, above, the significance of training in this context has also been recognised by a group of developing countries, which the ESF welcomes: see para 12, above.

¹¹ To cover the case of a supplier who does not have an overseas office or affiliate in an overseas country in which a contractual obligation relating to the supply of a service needs to be fulfilled.

¹² A possible approach to the variation of quotas would be to relate quotas (generally or by sector) to an official rate of unemployment.

- list “definitional elements” relevant for each category (taking care to ensure that these elements are not unduly restrictive).¹³

22 By itself, however, a common approach to formatting GATS Mode 4 commitments is unlikely to have significant effects unless it is clearly linked with market access. The ESF notes the suggestion made by the Communication from Argentina and a number of other Members¹⁴ that market access conditions pertaining to a standard classification based on category of service supplier (similar to the classification recommended by the European Communities but with variations in the definitional elements of sub-categories) be made, to include pre-employment criteria, the use of Economic Needs Tests, durations of stay pending renewal and wage parity. The ESF does not underestimate the scale of the challenge in seeking to reach consensus on these kinds of matters in a multilateral context but they do deserve consideration by WTO Members. The ESF welcomes the willingness of a number of WTO Members to narrow scheduling issues on Mode 4, which it hopes will be a prelude to reaching a broader measure of agreement on liberalisation in this important mode of supply.

Improving the effectiveness of commitments

23 In order to improve the effectiveness of Mode 4 commitments (and thereby reduce the time, costs and other burdens on the temporary movement of key business personnel), the ESF calls on WTO Members to provide arrangements and **procedures to expedite the temporary movement** of such personnel, which embody the following features:

- **conditions** of entry and stay that are **consistent with temporary entry and stay rather than permanent migration**;
- **provision of guidance** clearly specifying information necessary to support applications for work permits and visas, as well as the procedures and timescales to be applied (including appeals against refusal to grant temporary entry);¹⁵
- **use of information technology** to provide information and guidance relating to applications, registration of applications, transmission of information between relevant national authorities, monitoring of the progress of applications and maintenance of information about applications;¹⁶
- **provision of appropriate enforcement arrangements** to minimise the risks of abuse of temporary movement arrangements to secure permanent migration (for example, by requiring a service supplier from a sending country, as a condition of the grant of a temporary work permit, to undertake to cover the cost of repatriation in the event of non-compliance, or in the alternative by requiring the service supplier to enter into a bond with the relevant authority of the recipient country which would be forfeited in the event of breach of a condition of temporary entry and stay made by that country).

24 The ESF wishes to emphasise that its proposals and recommendations reflect what it considers to be a realistic and achievable package in three main respects:

- **Scope of personnel:** The ESF has given particularly careful consideration to the **skill level** to which its recommendations are designed to apply. Our recommendations are targeted at high skilled, professional level personnel - “key business personnel”. We have thus excluded lower skilled personnel at this stage in the *progressive* liberalisation envisaged by the GATS. Although the scope of

¹³ For example, it would not be appropriate for the contractual service supplier category to be limited by a definitional element which required not only educational qualifications but also a “professional qualification” in the Information and Communications Technology sector.

¹⁴ TN/S/W/31.

¹⁵ This UK website provides a useful example: www.workingintheuk.gov.uk

¹⁶ The Swiss experience of e-work permits is described in WTO document TN/S/W/22 (17 September 2004): www.wto.org

persons covered by the GATS and its Annex on the Movement of Natural Persons is potentially broad, we remain of the view that the inclusion of lower skilled categories in the current round of multilateral negotiations is likely to jeopardise the prospects of any meaningful liberalisation of Mode 4 at present. Our assessment is that there are probably better prospects for obtaining improvements in the temporary movement of lesser skilled personnel through the negotiation of bilateral or regional trade agreements that can be more finely attuned to address specific skill shortages.

- **Scope of coverage of ESF proposals:** The ESF's proposals in relation to Mode 4 do not address the related barriers to the movement of persons that may be caused by **domestic regulation**. For example, local licensing requirements of professional bodies may discriminate between overseas service suppliers or between such suppliers and domestic service suppliers; and the absence of agreements between WTO Members for the **mutual recognition of qualifications** (dealt with in Art VII of the GATS) may have significant practical effects on cross-border supply of professional services. These matters, which raise particularly complex issues in a multilateral context, are covered in another ESF position paper.¹⁷ Nor have we addressed the payment of social security contributions or the effect of totalisation agreements on key business personnel involved in temporary movements. This is not because we think these matters are unimportant but because we consider they are outside the scope of the GATS.
- **Implementation of ESF recommendations:** The recommendations of this paper can be implemented by **scheduling specific commitments and** by WTO Members (and we consider that common formatting could provide an important stimulus to this); **and by making improvements in the arrangements for administration** of work permits and visas. We have not made any recommendations in this paper about a "GATS Permit" (which some WTO Members have argued would be difficult to apply in practice), nor about the Draft Model Schedule which was annexed to our 3rd Position Paper – as one possible means of giving effect to our recommendations. We recommend that the WTO Committee on Specific Commitments consider what further guidance might be provided to Members seeking to give effect to the market access and national treatment recommendations made in paragraphs 18-20 above. We further recommend that trade, labour market, immigration and justice and home affairs departments regularly share knowledge and experience about the implementation of improved Mode 4 commitments, with a view to developing best practice.

VI Conclusion

25 The ESF repeats its view that there is significant scope for further liberalisation of Mode 4. The prospects of achieving some progress will be greater if trade negotiators focus their attention in the current round of GATS negotiations on the key issues that have been covered in this paper. The ESF therefore calls for the further liberalisation of measures governing the temporary movement of "key business personnel", in the priority sectors and countries which have been identified. It is in the strategic interests of the EU to pursue these goals which will help to realise the wider benefits of services liberalisation in the Doha Development Round.

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¹⁷ Domestic Regulation: Preliminary Discussion Paper (2001).

**List of ESF Members Supporting the
Fourth ESF Position Paper on Mode 4 – 11 April 2005**

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