

Mr. Peter Mandelson
Member of the European Commission
Trade Commissioner
European Commission
Rue de la Loi, 200
B - 1049 - Brussels

Brussels, 12th December 2006

Subject: **THE NEGATIVE LIST APPROACH IN BILATERAL SERVICES NEGOTIATIONS**

Dear Peter,

As you are aware, the European Services Forum (ESF) is one of the most consistent and long term supporters of the Doha Development Agenda (DDA) negotiations. ESF is extremely concerned by the state of play in the DDA, both in terms of the current suspension and the level of offers in services so far submitted. I would like therefore to open this letter by once again encouraging you to undertake, as I know you will, every possible effort to conclude the DDA within the small window of opportunity now available, and reaffirming that the round remains the highest priority for ESF. I also know that you are committed to an ambitious package for services, where the EU has the most to gain, and without which a Doha Round settlement would be of limited value to the EU.

The main purpose of this letter, however, is to address an aspect of the Commission's new trade policy for bilateral and regional free trade agreements (FTAs). ESF welcomed the Commission's October 4th communication "*Global Europe: Competing in the World*" and shares the view that EU trade policy has to adapt to a new environment in which complementary approaches to the multilateral negotiations are needed to deliver trade liberalisation. ESF therefore supports the end of the moratorium on new bilateral and regional trade deals and the Commission's request for mandates for negotiations with India, ASEAN and South Korea. We encourage the EU to prioritise ambitious trade liberalisation in services within these and future negotiations. At a minimum, agreements must involve wide sectoral coverage and WTO-plus commitments to be compatible with WTO rules (Article V of GATS).

ESF will come back to you with a more detailed paper on FTAs in early 2007. However, as the Commission begins discussions with the Member States on the content of the new mandates I should like to give you right away the ESF view on the fundamental question of **the approach to scheduling of services commitments in the new agreements**, in particular whether a negative or positive list approach should be adopted.

Services negotiations in the WTO follow the so-called positive list approach, whereby members' schedules of specific commitments list all of the services sectors and sub-sectors where they undertake to bind the market opening and the granting of national treatment to foreign service suppliers, apart the listed barriers that remain. Sectors and sub-sectors not included in the schedule are exempt from any obligations as regards market access and national treatment. ESF accepts that procedure for the GATS negotiations as it provides a certain flexibility and reassurance to some developing and particularly least developed countries, though we regret that too many WTO Members have applied that flexibility to the extreme and have not tabled much, and even very often have tabled no offer at all.

In FTA negotiations however, we recommend the use of a negative list. Under this system all sectors or sub-sectors not listed are, by default, open to services suppliers of both parties under the same conditions. The principal advantage is that it obliges the negotiators to review together all service sectors and therefore implies negotiation on all areas. Our analysis is that the use of the positive list approach gives countries negotiating with the EU encouragement to be more protectionist, as they can simply refuse to negotiate on the sectors or sub-sectors they are unwilling to open. This has been the case in the EU-Mercosur and EU-GCC negotiations for example. Any party seeking a bilateral agreement with the EU is well aware that Europe will require a substantial chapter on services. It is therefore well understood that all services sectors and sub-sectors are subject to negotiations with only few mutually agreed exceptions.

The second advantage of the negative list approach is that it includes services which are just being developed or will be developed in the future. It also allows for combinations of existing services to be offered in new and creative ways. This flexibility provides greater legal certainty for companies working in dynamic industries such as information technology, financial services and telecommunications and contributes to the innovation vital for future growth.

Third, negative lists produce greater clarity. It is much more straightforward for companies to assess whether their sector is covered or not and what the limitations are. This clarity, if continued throughout the EU's agreements would also assist in reducing the so-called 'spaghetti bowl' effect of the widespread proliferation of FTAs, which has the potential to produce great burdens for companies.

Fourth, it is clearly not true that negotiations on a negative list basis represent an impossible task for developing countries as agreements have been achieved in numerous cases. Those who have concluded such deals, like Morocco or Oman, are now more aware of the capacity and interests of their services sectors and are as a result ready to be more open with other trading partners.

Finally, the experience shows that negative list approaches yield greater results. As you know, the USA and many other countries like Japan and Canada have already negotiated many trade bilateral deals where they and their negotiating partners opted for the negative list approach. I believe that this is also true, at least to some extent, of Korea and Singapore, countries with whom the Commission hopes to negotiate. A recent WTO study on the results of recent bilateral and regional agreements on services has clearly shown that deals using the negative list approach have yielded greater liberalization than those based on a positive list – and not only for FTAs concluded with the US.¹

From recent meetings it seems to ESF that the Commission is relatively neutral on the two approaches but that some EU Member States may be more reluctant to engage services negotiations under the negative list approach. I hope therefore that this letter will contribute to persuading you and the EU Member States negotiators of the validity of our request.

I look forward to hearing from you on this issue.

Yours sincerely,



Lord Vallance of Tummel
Chairman of the ESF

Cc: Commissioner Charlie MC CREEVY, Internal Market and Services
Director General David O'SULLIVAN, DG Trade
Article 133 Committee

¹ Roy, Martin, Juan Marchetti and Hoe Lim, "Services liberalization in the new generation of Preferential Trade Agreements: How much further than the GATS?", WTO staff working paper, 2006, available at www.wto.org.