

Mr. Pascal Lamy  
Member of the European Commission  
Trade Commissioner  
Rue de la Loi, 170  
B – 1049 – Brussels

Brussels, 4 May 2000

**Subject : ESF comments on Emergency Safeguard Measures**

Dear Mr Lamy,

Please find enclosed the ESF response to the initial comments of October 1999 from DG Trade officials on ESF Position Paper of April 1999 on "GATS 2000 and Emergency Safeguard Measures - ESM"

It has first to be reaffirmed that in its previous paper, ESF did not favor an ESM mechanism, but was only providing the Commission with comments on such measures, should such a mechanism be unavoidable. Clearly, only the Commission as WTO negotiating party is in a position to make such an assessment.

However, whether it is better to develop a special ESM regime or, alternatively, to rely on existing GATS provisions to deal with emergency situations would seem to depend above all on a political assessment of the WTO negotiating process, in particular the need to accommodate demands of developing countries. This question is inevitably linked to greater GATS specific commitments in quality and in quantity in the schedules of these countries, which would wish to have such a mechanism in place.

The WTO plans to complete its work on ESM by December 2000. A large number of WTO members have signaled an increased interest in an ESM regime and the ASEAN group recently submitted a formal proposal for such a regime in the WTO Working Party on GATS Rules. This underlines the need to develop a sound EU position on the subject.

The ESF would therefore welcome a continuation of the dialogue with the Commission services on this important matter and hopes that the above observations are a useful further contribution thereto.

The list of ESN Members supporting the Declaration is attached.

Yours sincerely,

Pascal KERNEIS  
Managing Director

Cc: H.D. Beseler, Director General, DGI; M. P. Carl, Deputy Director General, DGI; R. Madelin, Director, DGI/M

The European Services Forum comprises 50 major European service companies, represented by their CEOs in the European Service Leaders Group and 36 European service federations, representing 22 services sectors. It represents the very large majority of the European service industries that have a direct interest in supplying international services.

Brussels, 12 April 2000

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**ESF response to the initial comments of October 1999  
from DG Trade officials**

on

**ESF Position Paper of April 1999  
on "GATS 2000 and Emergency Safeguard Measures"**

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The Commission's initial reaction of 19 October 1999 to the submission by the European Services Network (now renamed 'European Services Forum', ESF) of 23 April 1999 on Emergency Safeguard Measures (ESM) is very helpful because it clarifies further some of the main questions concerning this subject.

At the outset, it should be recalled that the ESF has submitted to the Commission two different papers on ESM:

- 1) The first paper, issued in February 1996, contained a critical analysis of the need for ESM and concluded that "no convincing case has been made so far of the need at this stage for a safeguard mechanism under the GATS";
- 2) The second paper, issued in April 1999, explicitly reconfirmed ESF's earlier findings but complemented these with observations on some of the key principles of a possible ESM mechanism under the GATS.

The second paper was in response to the Commission's request for additional input, based on the Commission's stated preference at the time for developing an ESM mechanism. The initial comments from the DG Trade officials on the second ESF paper now seem to convey a different message.

The above means, however, that the statement of the DG Trade officials that they "are so far not fully convinced of the ESF arguments on the desirability of ESM" is misleading, as it incorrectly suggests that the ESF favors an ESM mechanism. In reality, ESF's second paper with comments on such a mechanism was in response to the Commission's political assessment that such a mechanism would be unavoidable. Clearly, unlike the ESF, only the Commission as WTO negotiating party is in a position to make such an assessment.

The initial comments from DG Trade officials refer to GATS Articles XXI (Modification of Schedules) and XXIII (Dispute Settlement and Enforcement) as alternatives for an ESM mechanism. In the dialogue so far between the ESF and the Commission this alternative approach was never specifically suggested as an appropriate framework for ESM.

The question arises whether these GATS provisions indeed constitute such a framework. The ESF submits the following comments for consideration.

First, the text of Art. XXI indicates that it was written for purposes other than ESM. Application of this article in the case of ESM may give rise to practical problems. For example, pursuant to paragraph 1(a) a schedule modification is not possible within a period of three years following the entry into force of the commitment in question. What to do, if a real emergency arises within that period?

A further question is whether the use of Art. XXI and XXIII for ESM purposes should be actively advocated. It can be argued that it is better to have an agreed stringent framework for ESM with

strict controls than to leave such measures entirely to the judgment of each Member individually and rely on the system of compensatory adjustments and countervailing measures under Art. XXI and XXIII as a remedy. This system is designed primarily to maintain a reasonable overall balance of trade commitments and opportunities rather than to limit the damage of regulatory intervention in a given sector. Moreover, this approach would seem to be more "conflict-oriented" than a specific ESM mechanism. In these respects, a specific ESM mechanism could be said to have an added value in comparison with an approach based on Art. XXI and XXIII.

Whether it is better to develop a special ESM regime or, alternatively, to rely on existing GATS provisions to deal with emergency situations would seem to depend above all on a political assessment of the WTO negotiating process, in particular the need to accommodate demands of developing countries. In this connection, it would seem that the failure of the Seattle Ministerial Meeting and, as a result thereof, the Community's renewed focus on the needs and requirements of developing countries, justify a critical re-assessment of the Community's position so far with respect to the inclusion of a special ESM regime in the GATS.

Clearly, if a special ESM regime would be deemed politically desirable or unavoidable, it should be properly worded, so as to ensure that any ESM remain at all times under strict control.

In its comments so far, the ESF has focused mainly on the procedural aspects of such a control system. Questions of substance, relating to the type of circumstances that could justify ESM and the type of measures that could be acceptable, will be more difficult to resolve, particularly if - as recommended by the ESF - an ESM mechanism should be developed on a cross-sectoral and not on a sector-by-sector basis. Unavoidably, the wording of such a broadly applicable clause on ESM would have to be of fairly general nature, as is of course the case with many other GATS provisions.

However, this does not mean that such a general clause as referred to in the ESF submission would be virtually "empty", as alleged in the comments of the DG Trade officials. In fact, in its first paper the ESF specifically argued that "the definition of the objective of a safeguard instrument, if any, is of key importance in properly limiting the scope of such an instrument".

In that context the ESF pointed out that emergency situations should be "of an exceptional, non-recurrent nature", that safeguards should be used only "to redress patently abnormal trade situations", and that ESM "should not be invoked to deal with matters for which the GATS contains separate provisions" (e.g. protection of essential security interests, subsidies, etc). Such conditions could in ESF's view well be included in a general ESM clause (if any).

In its second paper, the ESF further suggested to rule out any ESM in cases where the domestic industry, which ESM seek to protect, largely consists of locally established foreign firms. In their comments the DG Trade officials point out that this could amount to discrimination. The question, however, is whether such discrimination would be 'undue'. The ESF suggestion is based on the view that in such circumstances the rationale for protection becomes extremely blurred. The DG Trade officials mentioned "WTO members invoking the clause may be more concerned by local jobs than by the nationality of the capital". The question is whether such concern is a valid ground for ESM. According to ESF, the purpose of any ESM should be the protection of vital domestic industry, not of local jobs. Arguably, if mainly foreign service providers operating under mode 3 would loose out in the competition with foreign service providers established elsewhere, there is little justification for ESM to protect "vital domestic industry". Given the overall purpose of the GATS, it would be both reasonable and necessary to insist on a very strict delimitation of the scope of any ESM, including the concept of the "vital domestic industry" which would qualify for protection in the case of an emergency.

Other substantive conditions, which could be considered for inclusion in a general ESM clause, are:

- a requirement that ESM must be non-discriminatory as regards the nationality or identity of the foreign-based service suppliers;
- a requirement that the serious injury to domestic industry must be a direct consequence of increased imports of competitive services from abroad;
- a requirement that ESM must not be more restrictive than necessary in order to relieve the problems.

Furthermore, introduction of a system of compulsory independent assessment of the alleged serious injury to domestic industry could be envisaged, as an additional safeguard before any ESM could be implemented. It would also be important to avoid the potential dangers inherent in granting the ability to take 'provisional' safeguard measures. In this context, it should be borne in mind that the paucity of data on trade in services increases the risk of abuse of an ESM regime. Appropriate measures minimizing that risk are therefore fully justified.

Finally, as far as ESM that restrict cross-border trade in services (mode 1) is concerned (which may well be by far the most significant target of any ESM in the services sector), it would seem that the contents of the 1994 GATT Agreement on Safeguards, and the experience gained under that agreement, should provide additional guiding material as to the type of substantive conditions that should be part of an ESM clause for services. As in the case of goods, any ESM regime for services should recognise "the importance of structural adjustment and the need to enhance, rather than limit, competition in international markets" and should as a rule require any ESM to be accompanied by a plan to show how the domestic industry will adjust and become more competitive.

The WTO plans to complete its work on ESM by December 2000. A large number of members have signaled an increased interest in an ESM regime and the ASEAN group is expected shortly to submit a formal proposal for such a regime. This underlines the need to develop a sound EU position on the subject.

The ESF would therefore welcome a continuation of the dialogue with the Commission services on this important matter and hopes that the above observations are a useful further contribution thereto.

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**LIST OF ESF MEMBERS SUPPORTING THE  
ESF REVISED PAPER ON EMERGENCY SAFEGUARD MEASURES**

**INSURANCE**

Allianz AG  
AXA Group  
BARC Versicherungs Holdings AG  
Norwich Union  
Comité Européen des Assurances - CEA  
Bureau International des Producteurs d'Assurances & de Réassurances – BIPAR

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European Association of Cooperative Banks - EACB  
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