ESF10-28

Mr. Karel De Gucht
Member of the European Commission
Commissioner for Trade
European Commission
Rue de la Loi, 200
B - 1049 - Brussels

Brussels, 6 December 2010

RE: European Services Industry Priorities on EU-India FTA

Dear Commissioner,

I am writing to provide you the European Services Forum's views on the on-going negotiations of the EU Free Trade Agreement (FTA) with India. This position is the fruit of an in-depth consultation among our members, many of them would have also send comments directly to your services.

The European Services Forum is strongly in favour of concluding a free trade agreement with India. Such an FTA would provide to the European businesses access to a huge potential market, in a country with a strong and regular growth rate.

As a starting point of the negotiations, ESF takes for granted that respective best GATS offers, including oral commitments made at the WTO Signalling Conference on Services on 26 July 2008 in Geneva, form the basis of the services and investment negotiations in this FTA.

Among the more services related priorities, the European services industry calls for the removal of all equity caps that may remain in India; the removal of all nationality or residency requirements for members of executive boards of branches, subsidiaries and joint-ventures; the negotiation of Mutual Recognition Agreements of diplomas and qualifications in professional services, starting with architectural services, aiming at legally binding instruments. Transitional periods that would mutually be agreed and subject to regular review might be envisaged in sectors where it would be acceptable for both parties.

The movement of services providers on temporary basis (GATS Mode 4) is absolutely essential for services companies to properly serve their customers. Our companies need to be able to send to India their personnel to their subsidiaries and other commercial presences (intra-corporate transferees – ICT) as well as to their clients for temporary periods on a specific contract basis. We encourage the EU negotiators to ensure that India will improve these possibilities and facilitate the granting of necessary visas and works permits in an expedited manner. In addition, there is also a substantial interest at European services providers to allow for mode 4 access for qualified Indian personnel to the EU to a sufficient degree. Thus, the EU services sector supports, in principle, Indian requests to the EU to open up more in this respect. While we acknowledge that such demands by India may be sensitive under labour market aspects, the needs of European business as well as demographic trends in Europe, which seem to increase the need for more openness of the EU in this area, certainly should be factored into the EU's negotiating position on the FTA with India.

The FTA negotiations on services with India, in addition of aiming at improving the traditional pre-establishment commitments, should also put the stress on post-establishment measures, as the problem of most EU companies is now that of being granted a fair and equitable treatment compared to Indian companies (tax case, licenses case, Universal service case). The talks should also try to address the issue of lack of clarity and ambiguity in Foreign Direct Investments rules (i.e. restrictions applied to FDI that do not apply equivalently to Indian companies). We urge therefore the European Union to provide you with the necessary mandate to negotiate investment access and protection in India.

With its huge population and an important increase of urbanization, India will face important challenges in providing relevant infrastructure for its citizens. The demand of road, rail, ports, inland waterway and other public transport infrastructure, of energy, broadband telecommunication network and drinking water networks, etc. will increase exponentially in the coming decades. The experience and expertise of European companies in these filed would be an important asset to help fulfilling this demand, provided that the public procurement market in India will be open accordingly. The FTA negotiations with India are the right instrument towards this endeavour and ESF strongly supports better access to India public procurements at all levels, in all public entities, for relevant services sectors.

The attached document goes into the details of the priorities of the various services sectors, sector by sector.

We shall be grateful to the Commission for taking the European service industry's priorities into consideration during the current trade negotiations with India, and remain at your disposal for any further information you and your services would find useful.

Yours sincerely,

Christoffer Taxell
ESF Chairman

Cc: Mr. Jean-Luc Demarty – Director General, DG Trade, European Commission
Mr. Ignacio Garcia-Bercero – Director, DG Trade, European Commission.

Brussels, December 2010

European Services Industries Priorities for the EU-INDIA Free Trade Agreement

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The European Services Forum (www.esf.be) represents a broad range of service sector interests, all of whom consider a Free Trade Agreement between the EU and India to be of paramount importance, but such an Agreement must deliver meaningful liberalisation from existing restrictions across all sectors whose interests and concerns are detailed in this document.

Introduction: India as a trading partner

India is developing into an open-market economy, yet many traces of its past policies remain in place. Economic liberalisation, including reduced controls on foreign trade and investment, began in the early 1990s and has served to accelerate the country's growth, which has averaged more than 7% per year since 1997. The population stands at 1.199 billion, and in 2009 India had a GDP of €886 billion, leaving a GDP per capita of €739. India's diverse economy encompasses traditional village farming, modern agriculture, handicrafts, a wide range of modern industries, and a multitude of services. Slightly more than half of the work force is in agriculture, but services account for 53.7% of India's GDP, compared to only 17.5% for agriculture. India has capitalized on its large educated English-speaking population to become a major exporter of information technology services and software.

An industrial slowdown early in 2008, followed by the global financial crisis, led annual GDP growth to slow to 6.5% in 2009, which nonetheless was still the second highest growth in the world among major economies. As with much of Asia, India escaped the brunt of the global financial crisis thanks to conservative prudential banking regulation and a relatively low dependence on exports for growth. It has increased the pace of privatisation of government-owned companies, partly to offset the public deficit. India's long term challenges include widespread poverty, inadequate physical and social infrastructure, limited employment opportunities, and insufficient access to basic and higher education.[1]

In terms of services, trade between the EU and India is still in its infancy, amounting only to a total of only €16 billion of transactions in 2009[2]. India is however the EU's 12th largest trading partner in services, with a 1.6 % share of the EU's trade in services. India is nevertheless the 5th major country in trade in services in the world, with €129.8 billion in 2008, i.e. EU-India trade in services represent more that 12% of India trade in services. Even if the trend shows considerable increase of the bilateral trade in services between EU and India in the last years, (rank 24th in 2003 with total transactions of € 5.8 billion – EU25), there is clearly significant potential to increased trade flows from a Free Trade Agreement.

India: trade liberalisation

In the framework of the on-going WTO DDA GATS negotiations, India has made a real effort and presented a Revised Offer in 2005, showing clearly that India has now offensive interests in trade in services, and wants to use its GATS offer as to attract foreign direct investment, in particular in

[1] Source: *The CIA World Factbook, 2009*

[2] EU Total international trade in services (Extra EU) = €972,8 billion (€529,5 billion exports and €443,3 billion imports), which makes EU-India services trade only 1,6 % of total EU trade in services – Source: Eurostat

tabling mode 1 and mode 3 commitments in many new sectors, including IT and BPO related services. The EU-India FTA negotiations should embrace all these aspects and ensure even more advanced preferential commitments.

Given that the approval of the FIPB (Investment Board) remains required in many cases of foreign investment, more transparent rules should be edited as to lift up the impression of possible discriminatory economic need tests.

After a period of hesitation and mutual assessment of potential benefit of such an agreement, the negotiations, which started between the EU and India in January 2007, have entered into real negotiating phase this year 2010. The FTA negotiations on services with India, in addition of aiming at improving the traditional pre-establishment commitments, should also put the stress on post-establishment measures, as the problem of most EU companies is now that of being granted a fair and equitable treatment compared to Indian companies (tax case, licenses case, Universal service case). The talks should also try to address the issue of lack of clarity and ambiguity in Foreign Direct Investments rules (i.e. restrictions applied to FDI that do not apply equivalently to Indian companies). Finally, an ambitious result on industrial goods with full coverage tariff liberalisation would be conducive to further enhance EU-India services trade.

I. HORIZONTAL ISSUES

1) Starting level of the services negotiations

ESF takes for granted that respective best GATS offers, including oral commitments at the WTO Signalling Conference on Services on 26 July 2008 in Geneva, form the basis of the services and investment FTA negotiations with India. ESF notes that India has pursued bilateral FTAs with other major trading partners in the meantime.

The underlying theme of this FTA, as with all FTAs, should be the ability of EU domiciled private sector companies to compete in the host market with the minimum of differential treatment compared to host country domiciled public or private sector companies. Competition widens consumer choice, lowers prices, results in better quality goods, creates jobs and helps the host society to keep step with technological developments. This positively impacts the skills of citizens, and drives innovation in the host market.

2) Services Commitments with a negative list approach

ESF encourages the negotiators to use the negative list approach with India, at least for the aspects related to establishment. As you know, this way of negotiating obliges the negotiators to review together all service sectors and produce greater liberalisation results and greater clarity, since it is much easier for companies to assess whether their sector is covered or not and what the limitations are.

3) Movement of natural persons (mode 4)

The movement of services providers on temporary basis (GATS Mode 4) is absolutely essential for services companies to properly serve their customers. When a good or service is exported to an overseas market there is frequently a need to transfer skilled personnel overseas to deliver that export or offer professional advice and ongoing services relating to it. In the case of manufacturing industry and large public works contracts, a EU contractor tendering for a contract will need, if the tender is successful, to be able to offer the relevant package of skills on the spot. In the case of financial or professional services for example, these services are frequently delivered in third country markets through local establishments and offices, enabling the service-provider to cater not only for international corporate clients' needs throughout the world, but also for local corporate and private clients, as well as state and local governments. Our companies need to be able to send to India their personnel to their subsidiaries and other commercial presences (intra-corporate transferees – ICT) as well as to their clients for temporary periods on a specific contract basis. We encourage the EU negotiators to ensure that India will improve these possibilities and facilitate the granting of necessary visas and works permits in an expedited manner.

In its GATS Offer for Mode 4, India has clarified that the GATS applies to *temporary* movement of natural persons. India has extended Business Visitors' entry from 90 to 180 days, which is welcome. Intra-corporate transferees may enter India for up to 5 years. Contractual Service Suppliers may stay up to one year in order to complete a contract. India's Revised Offer has added Integrated Engineering, Architectural, Urban Planning and Landscape Architecture, R & D, Management consulting (and related services), and Tourist Guide services to existing commitments in Engineering, Computer and Related-, Hotel and Restaurant & Travel Agency and Tour Operator services for Contractual Service Suppliers and Independent Professionals. These Mode 4 commitments are more than welcome and should be transcribed into the FTA India Schedule.

What is more, there is also a substantial interest at European services providers to allow for mode 4 access for qualified Indian personnel to the EU to a sufficient degree. Thus, the EU services sector supports, in principle, Indian requests to the EU to open up more in this respect (e.g., for longer time periods). While we acknowledge that such demands by India may be sensitive under labour market aspects, the needs of European business as well as demographic trends in Europe, which seem to increase the need for more openness of the EU in this area, certainly should be factored into the EU's negotiating position on the FTA with India. In addition, as Mode 4 access to EU markets constitutes a major Indian negotiation target, the EU could get substantially more from India in terms of market access commitments in services and elsewhere in exchange for a substantial offer on Mode 4 access.

4) Foreign direct investment regimes

ESF members call for the removal of all remaining equity caps that prevent EU businesses to fully control their investments and operations in India, or at least call for the possibility of majority ownership in all services sectors, if necessary through appropriate negotiated phasing out period. India's GATS Horizontal Offer of removing a Mode 3 requirement which required foreign acquisition of Indian shares to systematically receive FIPB (Foreign Investment Promotion Board) approval should be capitalised in the FTA. This is an unnecessary administrative and burdensome barrier.

ESF strongly encourages the European Union, in the framework of the new competence granted by the Lisbon Treaty on foreign direct investment, to negotiate investment protection with India. India is still a very modest recipient of European FDI: € 3.2 billion in 2009, and comparatively small compare to other important emerging countries, e.g., Brazil - € 5.1bn, China - € 8.9bn, and Russia €10.4bn[3].

Investors, when taking their decision to invest in a foreign country, look not only at market access, existing protection mechanisms and treaties, and the potential market/profits, but also at the tax environment. The present uncertainty concerning tax treatment, particularly concerning extra-territorial transactions, should be removed.

[3] *Source: Eurostat FDI Yearbook 2008*

5) Better access to Public Procurement

With its huge population and an important increase of urbanization, India will face important challenges in providing relevant infrastructure for its citizens. The demand of road, rail, ports, inland waterway and other public transport infrastructure, of energy, broadband telecommunication neetwork and drinking water networks, etc. will increase exponentially in the coming decades. The experience and expertise of European companies in these filed would be an important asset to help fulfilling this demand, provided that the public procurement market in India will be open accordingly. The FTA negotiations with India are the right instrument towards this endeavour and ESF strongly supports better access to India public procurements at all levels, in all public entities, for relevant services sectors (architects, engineers, construction services, transport services, waste management services, water distribution services, education services, telecommunications, IT and Computer related services, financial services, etc.). Given the sensitivity on this issue in India, including at sub federal level, appropriate negotiated phasing-out period might be envisaged.

6) Other Horizontal issues

The negotiations should also aim at removing or reducing the following barriers and solve the following issues:

(a) Eliminate economic needs tests, or at the very least provide systematic transparency and right of appeal when demand rejected

(b) Secure commitment to adopt disciplines that provide transparency for regulatory and procedural transparency, including prior comment on draft legislation and regulation.

II. SERVICES SECTOR SPECIFIC ISSUES

Method: In absence of full knowledge of current practice of all sector specific services legislation and regulation in India, given that the purpose of the Free Trade Agreement is to improve the current legally binding situation of India towards the European companies through an international treaty, i.e. the India Uruguay Round Schedule of Commitments, and given that the basis of the services and investment negotiations between EU and India are their respective current GATS Revised Offers, and given that the details of the WTO Signalling Conference on services of July 2008 are not public, ESF comments and recommendations are based on the content of India GATS Revised Offer, plus possible intelligence from ESF members. Some sectors are therefore analysed into more extensive way. For the convenience of the readers, we have adopted the order of the WTO W120 classification list.

ESF Members would have sent to the negotiators separate and more detailed positions, that we urge them to fully take into consideration.

A. Professional Services

1) Legal Services

We noted with disappointment that India made *no* commitments in legal services in WTO.

Specific Overall Objective: Removal of all barriers to market access and national treatment for providers of international legal services into the India market (including advisory services, arbitration and alternative dispute resolution).

Secure measures to allow EU law firms to practise in India. The passage of the Indian Limited Liability Partnership (LLP) Act in 2008 prepared the ground for this by reforming the framework for the operation of professional service firms in India. Implementing regulations under the LLP Act, together with amendments to the Advocates Act (1961) (or equivalent measures) and the tax code will have to follow in order to provide certainty for EU law firms.

Primary Objectives:

(a) Remove prohibition on ability of EU qualified lawyers to practise law in India in an advisory capacity (EU lawyers have no intention of appearing in the Indian courts);

(b) Implement LLP Act to permit an EU law firm to establish a branch of its international LLP or an India-headquartered LLP;

(c) Establish right of an EU LLP to employ Indian advocates and to take them into the partnership and vice versa;

(d) Establish right of an EU law firm to staff its office with professionals and support staff from abroad, subject to immigration rules;

(e) Establish right of an EU or EU-owned law firm to use the name by which it is internationally known.

Secondary Objectives:

(a) Clarify how EU law firms in India are to be regulated and create a transparent and modern process for regulating law firms, based on international best practice, as discussed in the Horizontal Provisions sections above (not necessarily through the Bar Councils);

(b) Creation of a foreign lawyers register under the auspices of the Bar Council;

(c) Unambiguous removal of any restriction on the number of partners in a partnership, including a partnership under the LLP Act;

(d) Amend sections 10 and 47 of the Income Tax Act to provide for a one-time exemption from tax on capital gains;

(e) Relaxation of the restrictions on marketing by law firms (recent decisions by the Bar Council of India to permit a degree of advertising and marketing do not yet give sufficient clarity to Indian law firms);

Obtain agreement for lawyers to enter multi-disciplinary partnerships.

2) <u>Accounting, Auditing and Bookkeeping Services</u>

India has made commitments in Modes 1-2 (excluding auditing services). We would like to see new commitments in Mode 3. Mode 4 is unbound, except as indicated in the horizontal section, with the additional requirement of obtaining professional indemnity insurance from home country of service provider.

Specific Overall Objective: Commitments by India to removal of all barriers to market access and national treatment, with additional commitments where necessary for this objective

Primary Objectives:

(a) Ability to use global network brand names as used in EU.

Secondary Objectives:

(a) Remove Institute of Chartered Accountants of India (ICAI) restriction on the number of statutory audits per partner for EU service-providers;

(b) Remove/ relax audit firm rotation rules in financial services' audits for EU service-providers;

(c) Remove maximum statutory insurance company audits per firm for EU service-providers;

(d) Remove maximum statutory bank audits per firm for EU service-providers;

(e) Allow more Indian citizens to be trained by EU firms to become professional accountants;

(f) Allow Indian students to undertake training programmes and qualifications provided by professional bodies located in the EU;

(g) Remove restrictions on the number of partners in traditional partnerships when involving EU firms;

(h) Allow local firms with internationally recognised names/logos and with additional weight of global networks to use those names and logos when signing reports of audits of Indian companies;

(i) Secure commitments to independent regulation of accountants (consistent with standards throughout the EU and to allow equivalence under the EU Statutory Audit Directive) on the analogy of, for instance, the UK Financial Reporting Council;

(j) Allow EU audit firms to register directly with the Government or independent regulator (and not via the ICAI) by setting up a separate registrar;

(k) Secure commitment to encourage reciprocity of membership of professional bodies between India and member states of the EU;

(l) Secure commitment to allow mutual recognition of qualifications for the purpose of carrying out statutory audits;

Secure commitment to implement external independent review of audit firms.

3) <u>Architectural Services</u>:

We are pleased that India has tabled a GATS revised offer in architectural services (CPC 8671), committing in Modes 1-3. However, market access is limited to incorporation with an existing Indian firm and is subject to FIPB approval: Removal of FIPB approval.

4) <u>Engineering Services</u>:

Although India has removed 51% foreign equity cap for engineering services, market access is still limited to incorporation and subject to FIPB approval: Removal of FIPB approval.

Integrated Engineering Services Urban Planning and Landscape Architecture Services:

India's GATS new offer commits Modes 1-3, though, as with engineering services, market access is limited to incorporation with an existing Indian firm and subject to FIPB approval. Although this is a good start, we would like to see these limitations and approvals removed.

Computer and Related Services: India's decision to commit at two-digit level in its revised GATS offer (CPC 84) and remove foreign equity ceilings is very welcome in this important sector for India economic development. It shows very impressive leadership and ambition on India's part. However, we would prefer that India commits the removal of market access limitations that only permit establishment through incorporation.

5) Research and Development Services:

In its GATS revised offer, India has added Mode 1 commitments on R&D services in agriculture and Modes 1-3 commitments on R&D services in social science and the humanities. It has also removed its foreign equity ceiling on its existing commitment on R&D services, though access is limited to incorporation and FIPB approval is required: Removal of FIPB approval. Research and development services present an important potential in India in many industrial areas, where many foreign firms might be interested in the opportunities provided by the immense reservoir of high skills graduates coming out of Indian universities, but a lack of openness hamper that development.

6) Real Estate Services:

Real estate on a fee or contract basis (CPC 822) should be committed, though in GATS offer foreign investors must have had prior collaboration with an Indian real estate firm and access is subject to FIPB approval: Removal of FIPB approval.

7) Rental and Leasing Services (without operators):

India has made new commitments relating to ships and aircraft, though FIPB approval is required for market access: Removal of FIPB approval.

8) Other business services:

India has made new Modes 1-3 commitments in management consulting, services related to management consulting, services incidental to fishing, services incidental to energy distribution, placement and supply of personnel, maintenance and repair of equipment, building cleaning services, packaging, convention, specialty design & photographic services. As in the abovementioned sectors, market access is subject to FIPB approval: Removal of FIPB approval. India has also lifted its foreign equity ceiling for its existing commitment in technical testing and analysis, which is very much welcomed.

B. Postal and courier services:

Competitive postal, courier and express delivery sectors are vital to the infrastructure of any economy. By not scheduling commitments, India is limiting its potential for economic growth. The effort undertaken to change national legislation provides an opportunity to ensure legal clarity and certainties for courier companies. We would welcome commitments for courier and express delivery services allowing foreign express delivery operators to continue to invest and operate in India without any additional restrictions, costs or preferences to national post over the private express delivery services. We propose the new Postal Bill to consider following:

- Time sensitive letters, parcels should be allowed to be carried by private Express Delivery Service providers without any restriction from Postal Bill.
- "Couriers" (Express Delivery Service Providers) should be distinct from "Postal Service Providers"

- "Time Sensitive" documents or parcels should be clearly defined so that clear distinction between Couriers & Post can be made.
- Private EDS/Couriers which run their network independent of the national postal operator's network should not be asked to contribute to compensation fund for the national postal operator/service.
- Privte express delivery service providers must be allowed to carry parcels and documents in all weight segments without any monopoly for Post.
- Private EDS/ Couriers should not be restricted by India Post on carriage of things that are otherwise not restricted by the national security agencies or the general law of the land.
- Private fleet operators should not be forced to carry mail bags at a price set by Regulator or India Post unless fleet operator finds the commercial proposal acceptable.
- Interconnectivity between networks of Postal Service Providers should be allowed on mutually acceptable terms and not as a mandatory requirement.
- There is no need for another policing authority, Regulator for private Courier/EDS sector. The highly competitive private express delivery services are already regulated by several government agencies, the Consumer Protection Act and the published Terms of Contract with the customers like many other industries in India that do not have additional sector specific regulator. EDS providers are also offering wide range of innovative products of high service standards that are determined by market expectations and contract. The services are not comparable to the universal service mail and over 2500 private operators are present in the EDS/Courier sector so it's not necessary to set up a Regulator with the mandate to control activities of the well performing private EDS sector which is not offering a service comparable to universal service mail.

C. <u>Electronic communications services:</u>

The liberalisation of the Indian electronic communications market has delivered great benefits to the Indian economy and its citizens. The India IT industry overall has been a global success, exporting more than €30bn of services. Competition has delivered lower prices, greater choice and wider network coverage.

1) Foreign ownership restrictions

India's WTO Offer on telecommunication services has removed Mode 2 limitations for voice telephone service, packet-switched data transmission, radio paging and V-SAT services. On commercial establishment, the foreign equity ceiling has been raised from 25 to 49%. Foreign investment is subject to FIPB approval and a license from the Designated Authority. For Data and message transmission services, the equity cap was raised up to 74% (from 51%) and removing Mode 2 restrictions. The foreign equity ceiling for all telecom service providers including mobile phone companies has been raised to 74%, though spectrum allocation is limited by spectrum availability and access is subject to FIPB approval. ESF asks for removal of any restriction on foreign ownership in this field. As regards current practice, foreign equity of 74% is now allowed for international and domestic long distance licences - investment of no more than 49% does not need to be approved by FIPB. However, there is a need for further reduction of the FDI restrictions; this will encourage foreign investment.

2) Licensing conditions

ESF is also concerned that, for the above licences (and potentially for the full range of licences), new conditions might be imposed prohibiting the remote management of networks in India, the transfer out of India of a range of information, and the routing of domestic traffic via other countries. These conditions are currently under review.

In the field of mobile telephony, certain recent policy initiatives have placed private sector players at a significant competitive disadvantage to the public sector operators, notably with respect to allocation of spectrum. Spectrum is the main source every mobile operator needs to have in order to deliver mobile services. In Europe, for example, spectrum is allocated among operators via public auctions. This ensures a fair and competitive process of allocation, but also economic efficiency. In India, some special favours and grants to foreign companies experienced preferred spectrum allocations and waivers of fees favoring public sector operators (BSNL and MTNL). These special privileges constitute clear examples of "state aid" that both distort the market and are inconsistent with India's commitments under GATS. Furthermore, in the context of the recent 3G auctions, the public sector operators are requesting important concessions from the Government (including possible refunding of the licence fee payments) that would further distort the competition on that market. ESF urges EU negotiators to ensure that this kind of discrimination should not occur at a time where India is negotiating further liberalisation with the EU in the FTA framework.

3) High Regulatory Levies, USO fees and Taxes

Similarly, the issue of discrimination between public and private operators rose also with respect to the Universal Service Obligation (USO) fund. The commitment to non-discrimination has been recently jeopardized on account of the Ministry of Finance's decision to reimburse the license fees and spectrum fees of the incumbent operator (BSNL) for the period FY 2002-03 to 2005-06 from the USO fund. This has created an inequitable situation vis-à-vis other private players, who have participated equally if not more in the creation of India's telecom success story ever since the liberalization of the sector.

Fees imposed by way of a Revenue Share on licence holders in India are among the highest in the world (6-10%) and are not tied to the cost of administration and running the regulatory regime. The Universal Service Obligation (USO), which is a part of annual license levy currently, requires operators to contribute 5% of their revenue, which along with the annual licence fees amounts to 6% of total revenue. Despite substantial growth in the telecom market in India, this percentage has not been reduced to take account of manifold increase in revenue. This has resulted in the USO fund amassing a huge surplus (approximately $4 Billion) which is currently not being used for the purpose. In addition to the USO and licence fee contribution, telecom operators are also required to pay spectrum usage charges (2-6%), service tax (of the order of 10% of revenue), taking the total regulatory levies and taxes on telecom services to the order of 22%, thereby making them amongst the highest in the world.

4) Virtual Private Networks

Across the globe, cross-border trade and investment in all sectors is increasingly dependent on provision of 'managed' IP connectivity. Thus, in a scenario where the FTA fails to achieve comprehensive opening of 'all' electronic communications services as defined in current EU legislation, it is vital to ensure inclusion of a specific commitment to opening of markets for Virtual Private Network (VPN) provision.

It also needs to be made clear that VPN providers are entitled to benefit from FTA provisions on non-discriminatory access to essential facilities. Such rules are particularly important for VPN providers since they must serve widely scattered sites, and are consequently unable to achieve the economies of scale needed to justify investment in their own local access networks.

The mutual benefits of market opening should be particularly clear in this field. Supply of IP connectivity which is managed end-to-end on worldwide basis is a critical input for India's Business Process Outsourcing sector. And India-based workers play a significant role in construction of the software platforms which enable VPN service provision.

5) General Resale

Resale of telecom services should also be covered by the FTA. It is currently prohibited though the government has recently allowed it for International Private Leased Circuits segment. Experience has shown that resale expands the market by offering improved service, greater innovation and more competitive pricing and therefore should be encouraged.

Similarly, there is a case for introduction of resale in access services like mobile through MVNO and resale in local loop through unbundling. Such regime can further fuel the growth of competition through service-based operators.

D. Satellite sector

1) Restrictions on the use of foreign satellite capacity:

The Ministry of Information & Broadcasting (MIB) has established guidelines that provide a preference for Indian satellites to provide direct-to-home (DTH) services, but which allow the use of foreign satellites if the foreign satellite has completed the international frequency coordination process with the domestic INSAT satellite system. The formal DTH policy states that Indian satellites will be given preference and as a result, Indian DTH and telecom licensees are not able to contract directly with foreign operators even if the satellite coordination has been completed and Indian satellite capacity is unavailable. In fact, it is significant that all foreign satellite capacity must be procured through the Indian Space Research Organization (ISRO), the operator of the INSAT system. ISRO only permits such use if it has no other available capacity on its system of Indian satellites, with the exception of some international, closed-user group applications.

2) Lack of clarity regarding Department of Space (DOS) role:

The Department of Telecommunications New Telecom Policy 1999 stated that users of transponder capacity would be able to access both domestic and foreign satellites, in consultation with the DOS, of which ISRO forms part. While it might be necessary for the DOS to ensure that foreign satellites are completing international coordination agreements with the INSAT system, there are no technical or commercial reasons why foreign satellite capacity should need to be procured through DOS (ISRO), a direct competitor of foreign satellite operators. This lack of clarity results in a competitive advantage for the domestic Indian satellite system.

3) Ku-band restrictions:

Ku-band is banned for use of broadcasting to cable head ends. There is no logical reason for this restriction, given that Ku-band capacity is just as suitable for video distribution as is C-band capacity, which is currently approved for this application in India. This restriction should be removed.

4) Security concerns:

Security restrictions on MSS operators require the deployment of particular gateway infrastructure despite the fact that more advanced technologies can meet policy concerns.

5) Restrictions on VSAT services:

The provision of VSAT services is stifled by unnecessarily restrictive policies. Current Department of Telecommunications (DoT) policy states that VSAT services can only be offered to closed user groups (CUGs) and as a result VSAT services to consumers (e.g. two-way broadband services) cannot be directly enabled.

6) Communications equipment authorizations:

In addition, similar to practices in Europe and other countries, India should be encouraged to adopt licence exemption regulations for certain satellite terminals (mobile satellite handsets, VSAT terminals) which meet relevant international standards and to streamline the national type approval processes overseen by DoT.

E. Construction:

We welcome India's removal of foreign equity caps in construction services, though incorporation and FIPB approval is still required: Removal of FIPB approval. India's new commitments in installation and assembly work, building completion and finishing work, and other construction services (CPC 511, 515, 518) are very welcome, too.

F. Distribution Services:

India's new GATS offer in **commission agents' services** and **wholesale trade** are very welcome though, we would like to see expanded sub-sectoral coverage as negotiations progress. As in other sectors, market access is subject to FIPB approval. Currently FDI in distribution service is restricted to 51% for single-brand retail and largely impossible for multi-brand retail. A removal of these equity caps is essential.

The Indian label law (2009) requires a number of mandatory information which needs to be displayed on the label (Name and address of manufacturer; name and address of the importer; generic or common name of the commodity packed; net quantity reported in metric; month and year in which the commodity is manufactured, packed or imported; Maximum Retail Price; contact number and email address for the customer service). Some information customers will find easier to have elsewhere, like on the receipt for contact information. Pricing information is usually given in the stores and in catalogues. Given the regional differences on taxes and other costs in India, a Maximum Price indication would require separate labels for each province and increase handling substantially

G. Environmental Services:

India has made Modes 1-3 commitments in **refuse disposal services** and **sanitation and similar services**. As above, we would like to see expanded sub-sectoral coverage as negotiations progress. As in other sectors, market access is subject to FIPB approval.

H. Financial Services:

1) BANKING

Specific Overall Objective: Commitments by India to removal of all barriers to market access and national treatment, with additional commitments where necessary for this objective.

Primary Objectives:

(a) Full national treatment of Wholly Owned Subsidiaries (WOSs) of EU Banks with no limitation on EU equity holdings and no requirement of "one form of presence" (i.e. both branch and WOS permitted for same group);

(b) Full national treatment for EU banks with established commercial presence, and for EU banks in the licensing of new bank branches and removal of the present cap on new branch licences for EU banks.

(c) If domestic banks are ever permitted to open new branches without prior permission (as recommended in the Rajan Report), there should be equal treatment for EU banks that are already established in India.

Secondary Objectives:

Ownership:

(a) Overall limit on foreign holding in a domestic bank to be increased from 74% to 100% for EU-owned entities;

(b) EU-owned banks to be allowed stakes in Indian banks of up to 100%, after a transitional period in which failing public/private sector banks can merge with EU banks;

(c) EU banks to be allowed to raise Indian Rupee (INR) subordinated debt and perpetual Tier II debt for their Indian operations;

(d) EU-owned banks converting from branch to WOS status to have the same minimum capital requirements as a domestic bank;

(e) Removal of requirement that 26% of the paid up capital of a WOS or privately-owned bank acquired by an EU services provider must be held by resident Indians within 3 years of incorporation or take-over;

(f) If 74% cap is retained for a transitional period, removal of the requirement that 26% must be held by resident Indians so as to permit strategic investments by Foreign Institutional Investors (FIIs);

(g) Removal of current maximum limit of 10% on any foreign bank investment in a Public Sector bank so as to permit strategic partnerships;

(h) Removal of restriction on voting rights currently capped at 10% in private and 1% in public sector banks regardless of actual shareholding;

(i) Relaxation of current threshold of 5% for foreign banks having a presence in India, and 10% for other foreign banks, for holdings in Indian private banks, possibly by transitional stages (this may need special exemptions from SEBI's open offer provisions in case of listed private banks);

(j) Clarification of policy on whether a foreign-owned WOS is a foreign or domestic company for downstream investments;

(k) Removal of the 74% cap on foreign investment in asset management companies;

(l) In accordance with Horizontal Objective (g), setting of fixed period in which decisions on acquisitions or mergers must be taken by regulators or deemed to be approved;

(m) Allow EU banks an FDI limit of 100% in Asset Reconstruction Companies – currently the limit is 49%.

Branches:

(a) Immediate removal of the current quantitative cap on new branch licences for EU banks or, failing that, removal after a transitional period;

(b) Removal of the requirement for prior permission for branch licences (either immediately or, failing that, after a transitional period;

(c) Removal of the requirement that branch licence applications can only be submitted once a year in an annual investment plan;

(d) Removal of all quantitative restrictions on licence applications for branches established in Tier 2/3 cities and rural areas, so as to help under-banked areas or, failing that, a right to open certain number of branches in Tier 2/3 rural areas in return for lesser number of branches in Tier 1/2 cities;

(e) Full national treatment on branch licensing for EU-owed banks either incorporated in India or with listings on the Indian Stock Exchange;

(f) Commitment to maintain single-class branch licensing policy;

(g) Removal of current requirement that branch licences may be denied if foreign banks' aggregate share of the banking market exceeds 15%. Failing that, agreement that the definition of the banking market is limited to on-balance sheet business;

(h) Relaxation of regulation which currently prevents foreign banks from buying more than 10% of a systemically important deposit-taking non-banking financial company (NBFC).

<u>National Treatment</u>:

(a) Removal of current regulatory requirements for approval of profit remittances or hedgeability of bank capital;

(b) Creation of a commitment to permit cross-border provision of financial information and processing of financial data;

(c) Agreement that in assessing capital requirements of WOSs or branches of banks assessed by their home country regulator to be compliant with Basel requirements, account shall be taken of parents' capital or guarantees;

(d) Removal of priority sector lending obligations on locally incorporated EU-owned banks until all restrictions on their ability to establish a national branch network are removed or, failing that, expanding definition of Small Scale Industries to include Small & Medium-Size Enterprises (SMEs) and inclusion of "infrastructure" in definition of priority sector advances;

(e) Removal of the discrimination in the rate of tax imposed on foreign banks (currently 48%) compared with that imposed on domestic companies (currently 35.7%).

(f) Removal of current requirement that the definition of a "branch" under the Branch Authorisation Policy of 2005 includes credit card centres, back offices and administrative accommodation;

(g) Commitment to remove discrimination under which public sector undertakings (PSUs) i.e. Government owned enterprises may only place deposits with local public sector banks;

(h) Permission for EU banks to be allowed to raise Tier 2 capital in India (local currency subordinated debt) as permitted for local banks;

(i) Removal of all restrictions on ability of banks to participate in exchange traded commodity products.

2) INSURANCE AND INSURANCE SERVICES

Specific Overall Objective: Removal of all barriers to market access and national treatment for providers of insurance and related insurance services, including admission of Lloyd's into the India market.

India currently maintains a foreign direct investment limit of 26%. India's market has grown remarkably over the past decade and over one million people are now employed directly or indirectly by the insurance industry. Foreign insurance and insurance intermediaries have invested significantly in India's financial markets and contributed to the country's infrastructure development. However there is clearly room for further growth. Effectively, the limit acts as a break on investment and serves to slow down the realisation of the full potential to provide Indian customers with professional advice on their insurance requirements and risk management needs. There is a foreign direct investment proposal waiting for the Indian Parliament's verdict. Should this insurance Act amendment pass then foreign partners' permitted stake would rise to 49%.

Primary Objectives:

(a) Remove restrictions on writing cross-border Marine, Aviation and Transport (MAT) and non-MAT large commercial risk insurance;

(b) End compulsory cessions of 10% of reinsurance business to the General Insurance Corporation (GIC) of India for all classes of business;

(c) Raise the level of permissible equity participation *in the form of FDI* by an EU joint-venture (JV) partner from 26%;

(d) Remove the provisions of the IRDA Act 1999 requiring either the domestic or foreign JV partner, after not less than 10 years of operation of the JV to reduce their equity participation to 26%.

Secondary Objectives:

(a) Allow cession to EU reinsurers abroad. Remove requirement for different percentages for domestic and EU reinsurers with respect to mandatory cessions, and the requirement (Indian GATS Schedule of Specific Commitments) for domestic cessions to be maximized before foreign cessions (Article 3 (1) IRDA (General Insurance-Reinsurance) Regulations, 2000);

(b) Grant EU reinsurers right of first refusal privileges (like their domestic counterparts);

(c) End the reinsurance monopoly in the non-life sector in India so far as it affects EU reinsurers;

(d) Either remove the requirement that Indian citizens or enterprises that purchase insurance services from an EU insurer abroad are required to have overseas remittance permission from the RBI India in accordance with "The Foreign Exchange Management (Insurance)

Regulations, 2000 Sec 3”, or grant the permission on a blanket basis, whenever requested; in addition, allow subsidiaries or branches in India of EU-based companies to remit without permission from IRDA/RBI for group or global insurance purchased by those companies from their global insurers;

(e) End corporate form discrimination for insurance and reinsurance: make appropriate provision allowing licensing of “members of Lloyd's”;

(f) In the case of EU insurers and brokers, remove restrictions on foreign equity ownership of insurance and insurance brokerage companies. Foreign insurers and brokers cannot establish unless via a JV with an approved partner with a minimum 74% local shareholding (Ss.2, 7A(b), Insurance Act 1938, as amended);

(g) Secure commitment that, where any part of the Indian pension system is open to private sector suppliers, EU providers will be permitted to supply the market;

(h) Remove rules and restrictive conditions that limit commercial presence for insurance intermediaries to reinsurance only;

(i) Remove discriminatory tax requirements for EU insurers;

(j) Secure commitment to remove the restriction in the IRDA bancassurance rules on numbers of permitted partnerships between banks and insurers, so as to allow (in the case of EU insurers in the Indian market) a bank to partner with more than one life insurer and more than one general insurer;

(k) In accordance with Horizontal Objective (g), secure setting of fixed period of [21] days in which IRDA decisions on product approvals applied for by EU insurance JVs must be taken by the IRDA or deemed to be approved.

(l) According to rules of the Insurance Regulatory and Development Authority (IRDA) in India, premiums must be paid directly to the insurer and cannot pass via brokers. This is a very unusual provision, in the vast majority of countries premiums may be sent via the broker, thereby following the general flow of communication on all other aspects. A provision whereby receipt by the broker constitutes payment to the insurer would overcome any credit risk (this is quite common in other countries).

(m) Brokers should be permitted to settle claims on behalf of insurers in India.

3) INVESTMENT & SECURITIES-DEALING SERVICES

Specific Overall Objective: Commitments by India to removal of all barriers to market access and national treatment, with additional commitments where necessary for this objective.

Primary Objectives:

(a) Secure commitments to remove all quantitative restrictions on EU investment into India;

(b) Secure commitments to remove restrictions of all kinds on EU non-banking financial companies (NBFCs), securities-dealing service-providers and securities advisory service-providers operating in India, and provide single-point clearance for authorisations to conduct business;

(c) Secure commitments to remove restrictions on the purposes (including as security for debt financing) for which EU investors may use their Indian portfolio holdings;

(d) Secure commitments to remove restrictions on Indian domiciled companies issuing shares in the EU and the trading of such shares in the EU;

(e) Secure commitment to amend foreign ownership restrictions relating to Indian stock exchanges and connected organisations to allow full liberalisation of overseas ownership requirements.

Secondary Objectives:

Investment:

(a) Secure Indian commitment that the Foreign Investment Promotion Board (FIPB) will be the sole "single window" clearance for all EU FDI coming to India;

(b) Secure interpretation by the FIPB of foreign investment guidelines to mean that foreign-owned companies in India are NOT treated as foreign companies, and so NOT subject to the same regulation as FDI investments;

(c) In relation to existing JVs, remove requirement for Government approval where a partner in such a JV wishes to set up a new project in the same field of economic activity;

(d) Secure commitment that the FIPB, when it modifies approval guidelines, automatically makes all companies eligible for modified approval criteria, whatever the previous requirements in the individual FIPB approvals applying to them;

(e) Reduce and eventually eliminate limits on portfolio investment at the individual and aggregate levels by EU FIIs;

(f) Permit EU individual investors to have direct access to the Indian market in securities;

(g) Allow EU FIIs to participate in primary issuances of debt securities;

(h) Remove sectoral restrictions on Foreign Venture Capital Investor (FVCI) registration;

(i) Remove restrictions preventing FIIs and private equity funds from offering their Indian portfolio holdings as security for debt financing in international markets.

Market Access:

(a) Secure commitment that NBFCs and other institutions will enjoy the same freedoms to provide investment advisory services as the freedoms enjoyed by wealth management services provided by banks;

(b) Permit securities firms or NBFCs that are regulated by the RBI to provide foreign exchange derivative products;

(c) Ensure that there is a technical assessment of the risk of the business to be entered into by EU service providers;

(d) Secure an agreed framework and timeline for removal of capital controls on EU service providers;

(e) Permit local Indian retail partners to promote EU-regulated financial services products (particularly retail trading platforms) with localised regulatory approval;

(f) In the case of EU service provision, secure commitment to allow capital to be held in a parent company rather than requiring it to be allocated to sub-companies for each investment-related or securities-related activity;

(g) Secure commitment to allow EU service providers to operate in the India foreign exchange market without a banking licence;

(h) Secure commitment that, as the India bond market develops, EU providers will be free to participate in it without restrictions;

(i) Remove restriction in India's current GATS commitment stating that: "public sector enterprises can invest surplus funds in term deposits only with scheduled commercial banks incorporated in India";

(j) Secure commitment to allow international standards of messaging (e.g. SWIFT) to be used for financial transactions for stocks and moneys by market intermediaries such as banks, brokers, custodians and exchanges.

<u>Tax:</u>

(a) Secure commitment to allow arbitration and dispute resolution to streamline the taxpayer appeals process;

(b) Secure India commitment to provide for safe harbour rules for outsourcing activities by prescribing the minimum mark-up/margin that such activities are expected to earn so as to give certainty on the amount of tax to be attracted;

(d) Simplify rules related to transfer pricing and processing of remittances and service tax;

(e) Create an Advanced Pricing Agreement (APA) procedure for EU businesses;

(f) Secure commitment that interest received by FIIs and non-residents from investment in corporate debt (whether in a dematerialized form or not, and whether listed or not) will NOT be subject to Indian withholding tax.

I. <u>Tourism and Travel-related Services:</u>

India has removed foreign equity ceilings and scheduled "none" for Modes 1-3 in **travel agency and tour operator services** (subject to FIPB approval), as well as adding commitments on **tourist guides services.**

J. <u>Transport Services:</u>

- ***Maritime transport:***

We note that India and the EU are already for several years, including a two year gap, in negotiations concerning a Maritime transport agreement. Meanwhile and that India's continued commitment to free access to market and access to and use of port facilities on national treatment basis is welcomed and a de-facto, if not de-jure, reality already. Also in the field of establishment – mode 3 – there are no restrictions experienced. Pending the conclusion of the bilateral maritime transport agreement, the EU maritime transport industry insists that maritime articles in an EU-India FTA shall be no less than the maritime provisions negotiated in the EU-Korea FTA. . Considering the geographical and trade conditions in India, there are some additional wishes, such as related to the relay or feedering if international cargoes and the positioning of equipment (empty containers) between Indian ports.

Particular attention to be given to the general note in the GATS offer and also raised in the bilateral maritime negotiations stating that all commitments are subject to domestic law and setting a requirement for incorporating as an Indian company; this makes no sense in negotiations that try to come to new more liberal terms for trade. A possible solution could be found in rephrasing into "applied in accordance with national laws, rules, regulations, notifications, guidelines, and existing bilateral agreements of the Contracting Parties with third countries". A further concern is the preferential treatment for Indian Flag carriers for governmental cargoes. We would like therefore that the bilateral agreement between the EU and India, be it stand alone and/or in the context of the FTA on maritime transport shall include commitments along the following lines:

In view of the existing levels of liberalisation between the Parties in international maritime transport:

(a) The Parties shall apply effectively the principle of unrestricted access to the international maritime markets and trades on a commercial and nondiscriminatory basis; and

(b) Each Party shall grant to ships flying the flag of the other Party or operated by service suppliers of the other Party treatment no less favourable than that accorded to its own ships with regard to, *inter alia*, access to ports, use of infrastructure and auxiliary maritime services of the ports, as well as related fees and charges, customs facilities and the assignment of berths and facilities for loading and unloading.

(c) In applying these principles, the Parties shall: (a) not introduce cargo-sharing arrangements in future bilateral agreements with third parties concerning maritime transport services, including dry and liquid bulk and liner trade, and not activate such cargo-sharing arrangements in case they exist in previous bilateral agreements; and (b) upon the entry into force of this Agreement, abolish and abstain from introducing any unilateral measures and administrative, technical and other obstacles which could restrict free and fair competition or constitute a disguised restriction or have discriminatory effects on the free supply of services in international maritime transport.

(d) Each Party shall permit international maritime service suppliers of the other Party to have an establishment in its territory under conditions of establishment and operation no less favourable than those accorded to its own service suppliers or those of any third party, whichever are the better, in accordance with the conditions inscribed in its list of commitments.

(e) Each Party shall make available to international maritime transport suppliers of the other Party on reasonable and non-discriminatory terms and conditions the following services at the port:

(1) Pilotage;
(2) Towing and tug assistance;
(3) Provisioning;
(4) Fuelling and watering;
(5) Garbage collecting and ballast waste disposal;
(6) Port captain's services;
(7) Navigation aids; and
(8) shore-based operational services essential to ship operations, including communications, water and electrical supplies, emergency repair facilities, anchorage, berth and berthing services.

LIST OF ESF MEMBERS SUPPORTING THE ABOVE POSITION

1. Architects' Council of Europe –ACE
2. British Telecom Plc
3. Bundesverband der Freien Berufe – BFB
4. Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
5. BUSINESSEUROPE
6. BUSINESSEUROPE WTO Working Group
7. Comité Européen des Assurances - C.E.A.
8. Confédération Fiscale Européennes - CFE
9. Commerzbank AG
10. Deutsche Bank AG
11. Deutsche Telekom AG
12. DHL Worldwide Network SA
13. DI – Confederation of Danish Industries
14. EK - Confederation of Finnish Industries
15. Ernst & Young
16. EuroCommerce
17. European Association of Cooperative Banks – EACB
18. European Banking Federation – FBE
19. European Community Shipowners' Associations – ECSA
20. European Express Association – EEA
21. European Federation of Engineering and Consultancy Associations – EFCA
22. European International Contractors – EIC
23. European Public Telecom Network – ETNO
24. European Savings Banks Group – ESBG
25. European Satellite Operators Association - ESOA
26. Fédération des Experts Comptables Européens – FEE
27. Fédération de l'Industrie Européenne de la Construction – FIEC
28. Foreign Trade Association - FTA
29. France Telecom
30. Goldman Sachs International
31. IBM Europe, Middle East & Africa
32. Irish Business and Employers Confederation
33. KPMG
34. Law Society of England & Wales
35. Lloyd's of London
36. Mouvement des entreprises de France – MEDEF
37. Oracle Europe, Middle East & Africa
38. Siemens AG.
39. Standard Chartered Bank
40. Svenskt Näringsliv (Confederation of Swedish Enterprise)
41. Telefónica SA
42. Telenor Group
43. The CityUK
44. Thomson-Reuters
45. Trägerverein Zenit e.V
46. TUI A.G.
47. Veolia Environnement
48. Vodafone
49. Zurich Financial Services