Brussels, 28 February 2007

ESF POSITION PAPER ON EU FREE TRADE AGREEMENTS

1. Summary

- ESF gives priority to the multilateral approach but welcomes the Commission's initiative to open new negotiations for bilateral and region-to-region free trade agreements (FTAs), provided ambitious packages on services form the core of any new agreements.

- Economic criteria must be used to assess any new FTA partners. ESF fully supports the negotiations proposed with India, South Korea and the ASEAN countries.

- EU FTAs should ensure that European companies receive at least the treatment given in other FTAs signed by our partner countries.

- ESF calls for the EU to reflect further on the possibility of services-only agreements, including with OECD countries in the future.

- Between the new negotiations proposed and the various ongoing negotiations (e.g. EU-Mercosur), the EU will soon be in discussion with almost all of the emerging countries it has prioritised in the DDA. This opportunity to achieve concrete results, i.e. real new market access in key countries soon, must not be lost.

- ESF favours a negative list approach to scheduling as, among other reasons, it ensures that negotiations take place on all service sectors unless specifically agreed otherwise and ensures legal certainty for new services. Measures must also be included to ensure legal certainty for existing services trade.

- Disciplines on domestic regulation must form an element of new agreements as a fair, transparent and proportional approach to regulation is key to ensuring meaningful services liberalisation.

- The services sector also encourages the inclusion of new disciplines on trade facilitation in future FTAs.

- Systematic consultation with business will be key to the success of future FTA negotiations. ESF urges the Commission and the Member States to closely associate the European services sectors during all stages of the negotiations.

2. Introduction

In light of the new approach to EU trade policy outlined in the European Commission communication "Global Europe: Competing in the World" and the subsequent request for mandates to open five new sets of negotiations for free trade agreements, ESF would like to lay out its views on the services aspects of bilateral and regional free trade agreements.

As a starting point, services industries must categorically state that the multilateral route to trade liberalisation remains the optimal one. The conclusion of an ambitious agreement on services in the context of the Doha Development Agenda negotiations must remain the top priority for EU trade policy. However, this prioritisation need not exclude other avenues to liberalisation and ESF thus applauds the decision to explore other avenues through bilateral and regional approaches, so long as ambitious agreements on services are at their core.

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Comprehensive bilateral deals will provide EU service providers with some of the new market access they need to continue growing as well as obtaining greater legal certainty through binding of current practice. They will also ensure that European services exporters are not placed at a competitive disadvantage in relation to their counterparts in the EU's major trading partners as a result of their own bilateral agreements. Finally, liberalisation on the bilateral level can also pave the way for future multilateral liberalisation. The progressive increase in the competitive pressures faced both by European and partner country companies as a result of bilateral liberalisation will prepare them for the more intense stimulus of global competition.

As a note of caution, ESF warns that the rapid conclusion of ambitious FTAs may be hampered if their negotiations are overloaded with wider political issues. The process should be motivated by economic criteria (see section 4 below) and economic questions must remain at the centre of the negotiations. .

Below ESF outlines a number of relevant issues for the upcoming negotiations from the perspective of services businesses.

3. An ambitious services package must be part of any successful FTA

Services account for over 77% of both European GDP and employment but to date represents only 28% of European external trade. Simply put, the growth potential implied by this disparity requires that all new trade agreements concluded by the European Union include a comprehensive package of services liberalisation. The EU must ensure that this fact is made explicit to all potential negotiating partners before talks are opened. In any case, the EU's future negotiating partners need access to the services that European companies can provide as much as EU companies need access to their markets. For developing and emerging economies in particular access to the world class infrastructure provided by European financial and telecommunications companies, as well as, for example, transport, logistics, water and waste management and energy related services companies and many others, is crucial for their future growth and development.

There should therefore be no question over the predominant place of services in any future EU FTA discussions and this implies both broad and deep coverage of service sectors. In addition, Article V of the GATS, which outlines the WTO disciplines on bilateral and regional trade agreements in services, stipulates that service agreements must have substantial sectoral coverage and provide for the elimination of substantially all discrimination with flexibilities for developing countries. Furthermore, bilateral deals have the potential to create trade and prepare for wider regional and global integration but this is less likely if coverage is not broad and does not remove real barriers. Finally, the broader the coverage, the easier it will be for companies to navigate a global trading system which is likely to involve an increasing number of FTAs. A network of complicated agreements with many exceptions and carve-outs will be much more burdensome to understand and administer. There is considerable reason to be optimistic that services agreements will be successful. Indeed, a recent WTO survey of FTAs concluded since 2001 has shown the substantial progress that has been made in many of them.[1] The EU must make the most of this opportunity.

European service companies can no longer afford to watch their competitors gaining new market access in countries with which an FTA has been signed. European companies are gradually losing current market share and potential future access to these markets and regularly have to wait longer to obtain licences required for market entry as competitors often obtain privileged access to these as an informal but nonetheless integral part of bilateral deals. The EU's future FTAs must guarantee at least the same treatment accorded to any other trading partners through other agreements. They should also include a clause guaranteeing that any preferential treatment granted to third countries in the future is automatically extended to the EU. The EU must not allow the gains it makes in its deals to be diluted as new agreements are concluded between our FTA partners and third countries.

Similarly, where there are provisions in EU Member States' bilateral agreements (e.g. certain provisions in bilateral investment treaties (BITs), etc.) that overlap with the areas covered in an FTA,

[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.

EU negotiators must ensure that the starting point for their negotiations is the most favoured treatment received by any Member state.

On a related point, ESF is conscious that many elements of the services liberalisation achieved through bilateral FTAs will by their nature be granted on a *de facto* most favoured nation basis. The removal of general regulatory barriers will benefit companies from all countries wishing to trade with our FTA partners. This process is beneficial in general terms as European companies will as a result also benefit to some extent from FTAs between our trading partners. However, ESF would also welcome genuinely preferential elements in EU FTAs and will study further options for such measures.

4. Partner countries

The new generation of EU FTAs will certainly not be its first – the EU has notified over twenty such agreements to the WTO since 1971. In the past the EU's FTAS have often been motivated by political factors and formed part of wider agreements covering issues unrelated to trade policy. For the new generation of agreements this must not be the case. Economic criteria should be at the core of judgments about future FTA partners. The Commission has outlined a number of economic factors it is using to assess the opening of new negotiations, including:

- The size and growth perspective of the targeted markets;
- Existing levels of protection for the domestic players (e.g. services regulations, public procurement rules, tariffs etc.);
- The state of play of the current conditions (implemented FTAs) and possible other bilateral negotiations going on with other trading partners;
- A common level of ambition and expectations on both sides before embarking on negotiations.

ESF fully supports this approach and accordingly very much welcomes the Commission's request for mandates to negotiate FTAs with India, South Korea and the ASEAN countries. European services businesses also note the request for mandates discussions with Central America and the Andean Pact countries. ESF of course supports all agreements that provide real new services liberalisation. It therefore calls on the EU to allocate adequately its resources in its bilateral trade strategy with a particular focus on the countries/regions with the highest growth potential and commercial opportunities for European business ahead of more general political cooperation agreements.

Looking to the future, it will be important to keep the list of potential FTA partners under active review. No OECD country should be a priori ruled out for instance, particularly not our largest trading partners. A full agreement with China to build on the forthcoming Partnership and Cooperation Agreement (PCA) should also be considered given its ever-expanding relationship with Europe. Furthermore, the EU should in the future look at the possibilities for agreements focused only on services.

ESF would, for instance, be glad to explore further the recent suggestion by US Senator Max Baucus, new Chairman of the Senate Finance Committee, of a trilateral services FTA between the US, EU and Japan. Article V of GATS would not seem to raise any objections to such deals and given that the EU currently only has two bilateral agreements that cover services – with Mexico and Chile – there is ample room for progress. One should also not exclude the possibility of negotiating sector-specific agreements where there is industry support.

ESF would also like to draw attention to negotiations already underway, including the EU-Mercosur and EU-GCC talks, the negotiations on services and investment with seven Euromed countries and the talks under way to create economic partnership agreements (EPAs) with the African, Caribbean and Pacific (ACP) countries.
It is worth noting that between these and the new negotiations the EU is now in conversations with a sizeable proportion of the WTO members that were on its priority list in the Doha Round (*see*

annex). For instance, of the emerging markets targeted by Commissioner Mandelson's letters to his counterparts on the GATS negotiations in May 2006, only Pakistan, Hong Kong and Taiwan are excluded (though the PCA negotiations with China will only address investment and not barriers for modes 1, 2 and 4). To the extent that the Doha Round does not yield the early and significant results on services which ESF would like to see, this range of negotiations should provide an alternative means of making progress. Each of these negotiations is producing different results in terms of coverage of the services chapter, according to the instrument under which they are conducted (Interregional Association Agreement, Economic Partnership Agreement, Euro-Mediterranean Partnership).

While difficult to obtain full uniformity, the EU should proceed with the highest level of ambition trying to set up a guiding benchmark of positive outcomes that could be used as a template for these and future negotiating processes. Each negotiation should cover not only the traditional market access negotiations (commercial presence, cross-border supply of services and the temporary movement of business natural persons) but also a clear regulatory framework (see section 6 below), provisions on e-commerce, provisions on government procurement, on intellectual property, on subsidies and possibly on trade related aspects of technical assistance and capacity building cooperation.

5. Negative versus Positive List

The approach to scheduling taken in trade agreements – positive or negative list of sectors – can have an impact on the quality of commitments achieved. ESF accepts a positive list approach in the GATS negotiations as it may provide a certain flexibility and reassurance to some developing and particularly least developed countries for instance, though we regret that too many WTO Members have applied that flexibility to the extreme. In FTA negotiations however, we recommend the use of a negative list.

The principal advantage is that it obliges the negotiators to review together all service sectors – with only few exceptions – 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. Second, the negative list approach permits parties to include automatically, in an appropriate manner, 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 legal certainty for companies, whose activities and processes innovate continuously, improving quality and efficiency and thus enhancing growth across the wider economy. Naturally, care must also be taken to ensure certainty for existing and new services to avoid potential confusion on the scope of the services subject to regulatory provisions through additional commitments such as reference papers. In this approach, it is of the utmost importance that the classification or description of services used by the parties in their commitments must be clearly defined. 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.

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, for example between the US and Morocco and Oman. Finally, the experience shows that negative list approaches yield greater results. The USA and many other countries including at least to some extent, Korea and Singapore, countries with whom the Commission hopes to negotiate have used this approach. The WTO survey referred to above 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.

The Chairman of the ESF, Lord Vallance, set out these arguments in a letter to EU Trade Commissioner Mandelson on 8 December 2006 and welcomes the Commissioner's response. ESF is agreed that the central aim of any approach to the negotiations must be the broadest possible sectoral coverage with few agreed exceptions in all the trade agreements and is pleased that the Commission will ensure that this objective remains its focus as it goes forward. ESF remains nonetheless convinced that the certainty provided to new services by the negative list approach is valuable and that this approach is to be preferred, in the EU interest.

6. Domestic regulation

Fair, proportionate and transparent regulatory frameworks are an absolute priority for services companies wishing to operate in third country markets. The EU should accordingly take advantage of the excellent opportunity afforded by its FTA negotiations to focus on the regulatory environment in our trading partners' markets. ESF would like to raise a number of issues in this context:

- A commitment to transparency forms the basis of any good regulatory regime as is recognised by the prominent position it is accorded in the GATS. Clear standards governing publication of new regulations, consultation of stakeholders, fairness of application processes, appeals procedures and arbitration must form part of any new FTAs. ESF has outlined a detailed framework for transparency provisions in the WTO context and feels that it applies equally to FTA negotiations. (See *ESF Second Position Paper on Domestic Regulation and ESF Preliminary Discussion Paper on GATS and Domestic Regulation*[2])

- Quality regulation should also meet tests of necessity and proportionality. At the multilateral level, rules covering these aspects of domestic regulation only apply to sectors which are committed under GATS. The EU should at a minimum ensure that all sectors committed in its FTAs – which for the reasons outlined above should be broader than current WTO commitments – are subject to the same disciplines. The EU may also wish to look at refining the concepts of necessity and proportionality to provide greater clarity for regulators and regulated service industries.

- In certain sectors regulatory disciplines may be required to ensure that commitments on market access and national treatment taken in the schedule are made workable. In such cases sectoral disciplines may be necessary. As a starting point the EU should ensure that all its FTA partners sign up to the relevant reference papers, annexes and model schedules agreed at WTO level. Further sectoral initiatives should also be considered where there is business support.

- The establishment of effective regulatory cooperation mechanisms should also be a goal of EU FTAs. The ultimate goal of services providers operating internationally would be to follow a harmonised, high quality system of regulations and standards. While this may be a distant prospect, cooperation between regulators of different jurisdictions – involving all appropriate levels including EU Member States or the regulators with jurisdiction at state, provincial or regional level in third counties – can work in this direction incrementally. Where there is business support, mutual recognition agreements (MRA) should also be encouraged so as to further facilitate the mutual market access to businesses. Where international regulation and standards have been agreed, the EU should encourage partner countries to adopt and implement them.

7. Trade facilitation

Although trade facilitation is often associated with trade in goods many services sectors – e.g. transport, logistics and express – are directly concerned by this issue and will be the direct beneficiaries of new disciplines in this field. For example, in transport sectors, carriers have to fulfil a series of formalities upon arrival and before unloading of cargoes and the same apply for effective departure. Delays in these procedures bear a direct cost to the carrier, but also often result in congestion in ports and terminals, which in turn result in delays in clearing of cargoes and overall increases in costs of trade. ESF has a detailed position on trade facilitation in the WTO, which is also relevant in the bilateral context. (See *ESF Position Paper on Trade Facilitation*[3])

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[2] Available at: http://www.esf.be/004/002.html
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8. Consultation of industry by the Commission

Consultation of industry is fundamental to the success of any trade negotiation as negotiators need the technical expertise and information that only business can provide. This is no less the case for bilateral and regional agreements than for the multilateral process. ESF is concerned however that the Commission has not in the past been sufficiently transparent in the conduct of bilateral discussions (e.g. in the EU-GCC negotiations). While the multilateral process is in fact relatively open given the number of actors involved, the lack of information available in bilateral negotiations has made it difficult for service operators to provide meaningful comment to negotiators at critical stages of the negotiations.

It is crucial therefore that a systematic approach is taken to consultation of business in FTA negotiations going forward, as to allow input from stakeholders of the negotiations, and this at all steps of the negotiations. Close cooperation between the negotiators and the domestic services businesses exists in most of the countries and regions with whom the European Union will negotiate in the future. It will therefore be important to treat European businesses in a non discriminatory way. ESF's members have chosen to expand its activities from the WTO to include EU bilateral negotiations and our organisation would accordingly be very pleased to continue to provide the Commission and Member States with advice and expertise from a horizontal services sector viewpoint and to act as a focal point for the Commission's briefings of the service industries on these issues.

Annexes: **Priority markets targeted by the EU in the GATS discussions vs. those covered by current and forthcoming bilateral negotiations**

List of ESF Members Supporting the Position Paper on EU Free Trade Agreements

Annex

Priority markets targeted by the EU in the GATS discussions[4] vs. those covered by current and forthcoming bilateral negotiations

	Markets	Negotiation
1	Argentina	EU-Mercosur FTA
2	Australia	*OECD*
3	Brazil	EU-Mercosur FTA
4	Canada	*OECD*
5	China	Bilateral PCA (incl.invst)
6	Egypt	Euromed
7	Hong-Kong	
8	India	Bilateral FTA
9	Indonesia	EU- ASEAN FTA
10	Japan	*OECD*
11	Malaysia	EU-ASEAN FTA
12	New Zealand	*OECD*
13	Pakistan	
14	Philippines	EU-ASEAN FTA
15	South Africa	EPA SADC (applied)
16	Korea	Bilateral FTA
17	Singapore	EU-ASEAN FTA
18	Switzerland	*EU-EFTA*
19	Taiwan	
20	Thailand	EU-ASEAN FTA
21	USA	*OECD*
22	Uruguay	EU-Mercosur FTA

[4] 21 Countries receiving letters from Commissioner Mandelson on 30 May 2005 plus Egypt

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1. Accenture
2. Architects' Council of Europe – ACE
3. Association of Commercial Televisions – ACT
4. Barclays PLC
5. British Telecommunications plc - BT
6. Budesverband des Freien Berufe – BFB
7. Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
8. Confederation of Bristish Industry - CBI
9. Comité Européen des Assurances - C.E.A.
10. European Council of the Liberal Professions – CEPLIS
11. Conffédération Fiscale Européenne - CFE
12. Clifford Chance
13. Comité de Liaison des Géomètres Européens – CLGE
14. Commerzbank AG
15. Deutsche Bank AG
16. Deutsche Telekom AG
17. DHL Worldwide Network SA
18. EDS Europe, Middle East & Africa
19. EK - Employers' Confederation of Service Industries, Finland
20. Ernst & Young
21. Eurelectric - Union of the Electricity Industry
22. EuroCommerce
23. European Association of Cooperative Banks – EACB
24. European Banking Federation – FBE
25. European Community Shipowners' Associations – ESCA
26. European Express Association – EEA
27. European Federation of Engineering and Consultancy Association – EFCA
28. European Film GATS Steering Group
29. European International Contractors - EIC
30. European Public Telecom Network – ETNO
31. European Retail Round Table – ERRT
32. European Savings Banks Group – ESBG
33. European Satellite Operators Association - ESOA
34. Federation of European Consultancies Associations – FEACO
35. Fédération des Experts Comptables Européens – FEE
36. Fédération de l'Industrie Européenne de la Construction – FIEC
37. France Telecom
38. Free and Fair Post Initiative -FFPI
39. Goldman Sachs International
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. Law Society of England & Wales
46. Lloyd's of London
47. Metro AG
48. Mm02
49. Oracle Europe, Middle East & Africa
50. Portugal Telecom
51. PricewaterhouseCoopers
52. Prudential
53. Royal Ahold NV
54. Royal Bank of Scotland – RBS
55. Siemens AG.
56. Standard Chartered Bank
57. Svenskt Näringsliv (Confederation of Swedish Enterprise)
58. Telecom Italia
59. Telefónica SA
60. TNT
61. TUI A.G.
62. UNICE
63. UNICE WTO Working Group
64. Universal Music International
65. UNIQA Versicherungen AG
66. Veolia Environnement