

## ESF Position Paper on WTO Disciplines on Services Domestic Regulation

### Executive summary:

- European services businesses are confronted on a daily basis to domestic regulations in their headquarters' countries as well as to domestic regulations in third countries where they want to export or invest.
- The lack of transparency and due diligence in the regulatory environment are systematically raised as major trade barriers when European service business try to open or expand business abroad or to export in third countries.
- ESF suggests a non-exhaustive list of provisions that should be included in these WTO disciplines, with notably provisions on transparency, on the authorisation processes, and on the independence of the regulatory bodies.
- The European Services Forum calls on the largest number of WTO members to adopt the disciplines and to include them into their own national GATS Schedule of Commitments as additional commitments, so that they become legally binding disciplines, applied on a Most-Favoured Nation (MFN) basis.
- The European Services Forum calls upon WTO Members to engage in the coming months in final negotiating phase towards the adoption of WTO Disciplines on Services Domestic Regulation by the Twelve WTO Ministerial in June 2020.

The European Services Forum (ESF) represents the interests of European services sectors committed to actively promoting the liberalisation of international trade and investment in services. ESF is a European private sector grouping that comprises major European service businesses and European service sector federations covering service sectors including financial services, telecommunications and IT services, maritime transport, business and professional services, distribution, postal and express delivery, audio-visual and education services, etc. All these services sectors are, in a way or another, subject to specific regulation adopted by domestic regulatory authorities.

The European Union is by far the biggest exporter and importer of services in the world, with a total annual volume of €1809 Billion in 2017, representing 23% of global trade in services (Extra EU) and an intra-EU trade in services volume of €2438 Billion in 2017. Taking together intra and extra EU trade in services volume, the EU represents 41% of world trade volume in services<sup>1</sup>. The EU is also the biggest world investor (€10.6 Trillion Outward stocks in 2017 – 34% of global FDI) and recipient (€9.1 Trillion Inward stocks - 29% of global FDI<sup>2</sup>) of foreign direct investment, more that 60% of which is coming from services companies (outward FDI) and 90% going to services sectors (inward FDI)<sup>3</sup>. The European services enterprises are therefore regularly confronted to domestic regulation in their headquarters' countries as well as to domestic regulation in third countries where they want to export or invest.

The European Services Forum welcomed the Joint Ministerial Statement on Services Domestic Regulation, adopted by trade Ministers from 60 countries at the WTO Ministerial Conference last

<sup>1</sup> WTO Trade Statistical Review 2018

<sup>2</sup> UNCTAD World Investment Report 2018

<sup>3</sup> Source: Eurostat ([bop\\_fdi6\\_pos](#)) - Extra-EU foreign direct investment positions, by economic activity, EU-28, 2014 - (% of all economic activities) – See [here](#).

December in Buenos Aires. This proponent group, encompassing participants from developed and developing countries, “call upon all WTO Members to intensify work post-MC11 towards concluding the negotiation of disciplines on domestic regulation [...] in advance of the next Ministerial Conference”.

As the proponents of that initiative who acknowledge the good progress made in reviving the negotiations in the WTO Working Party on Domestic Regulation (WPDR) in Geneva, ESF could only regret that it failed to deliver concrete results in Buenos Aires.

ESF, therefore, calls for the continuation at steady speed of the on-going negotiations that were mandated by Article VI.4 of the General Agreement on Trade in Services aiming at setting up disciplines in the countries’ domestic regulation on the various services sectors. ESF urges the negotiators to carry on the smooth atmosphere that prevailed in Geneva in this year 2018 so as to reach an agreement by the Twelve WTO Ministerial in June 2020 in Astana (Kazakhstan).

Indeed, when asked about the major trade barriers that they encounter in trying to open or expand business abroad or to export in third countries, European service businesses will systematically raise the issue of lack of transparency and due diligence in the regulatory environment. With one of the major objectives of the negotiations for disciplines in services domestic regulation being to provide more transparency of existing rules for services providers, giving information on licensing and authorization procedures, etc., the European Services Forum fully supports this initiative.

## **1. The Context**

ESF would like to recall briefly the relevant context, which informs its views on the direction of development in this area.

Market access negotiations were conducted on accountancy under the Uruguay Round, which was concluded in April 1994 in Marrakech (Morocco). The GATS Article VI calls for the development of disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute such barriers. In May 1997, the Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector were adopted, followed on 14 December 1998 by the WTO Decision setting up the [Disciplines on Domestic Regulation in the Accountancy Sector](#). The disciplines are applicable to all WTO Member who have scheduled specific commitments for accountancy under the General Agreement on Trade in Services (GATS). This was meant to be the first step in the development of other GATS Disciplines on the domestic regulation of services. In April 1999, the WPPS was replaced by the Working Party on Domestic Regulation. Furthermore, it is also worth to remind that in 1997, 82 WTO members have committed to the regulatory principles spelled out in the “Reference Paper” at the end of the negotiations on basic telecommunications services. This Reference Paper largely reflects principles of good governance in telecoms regulation to further transparency, non-discrimination and competition. By taking this “reference Paper” as additional commitments to their GATS schedule, these countries have agreed to incorporate these disciplines into their domestic regulation.

For many years, the Council for trade in services and its depending “Working Party on Domestic Regulation” has worked toward the development of disciplines in other sectors but without much result. ESF, at the beginning of its work, developed Position Papers on this matter where we went into the very details of this matter<sup>4</sup>. These positions remain pertinent today, although they have to

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<sup>4</sup> A) [Position Paper on GATS horizontal issue: Domestic regulation and the development of pro-competitive regulatory principles](#) - 3 May 1999

be taken in their own context. ESF can only regret that this work never led to further binding disciplines for all WTO members. The work undertaken in 2017 before MC11 aimed at reviving the discussions on this matter<sup>5</sup>.

When we look at the EU practice on this issue, one can see that the European Union does now systematically include in its recent Free Trade Agreements, language and commitments related to the domestic regulation in the services and other sectors (for example Chapter 12 in CETA, or Chapter 8, Section E, Sub-section I in EU-Japan EPA on “Domestic Regulation”). The European Services Forum welcomes this important information on the licensing and administrative procedures in trade agreements, providing service companies necessary tools for exporting and setting up activities in foreign markets.

ESF is aware that other free trade agreements by other trading partners have incorporated similar provisions on domestic regulation. ESF was also following closely the Trade in Services Agreement (TiSA) negotiations, where much progress was made in that field, and we can only deplore the discontinuation of these negotiations. We understand however that much of the content of these talks have inspired the on-going work of the WTO Working Party on Domestic Regulation (WPDR) in Geneva, and we welcome this move.

## **2. The possible content of the Disciplines**

The European Services Forum is following closely the discussions on the various issues that should be included into domestic regulation disciplines. ESF would like to suggest a non-exhaustive and in-no-particular order list of provisions that should be included in such disciplines:

### **a) Provisions on transparency**

- Transparent regulatory environment: all regulation (at all administrative level) should be easily accessible and comprehensible, and since this exercise is notably destined to foreign businesses, translated at least into English.
- Publication: all regulation (at all administrative level) should be made public and incontestable.
- Enquiries: all businesses should have access to contact points, preferably through one-stop-shop, where they can enquire about the regulatory process for their sector, what is the authorisation procedure, etc.
- Review and appeal: Should a business be not qualified to obtain the authorisation to start business in its area of interest, proper mechanism should be available to ask for a review and an appeal.

### **b) Authorisation process**

- Requirements for Applications and Examinations: The requirement and conditions set up by the regulatory authorities should be clear and updates should be made easily available;
- Setting of Fees: the fees to obtain the license or any other relevant authorisation should be public, non-discriminatory, reasonable and be limited to cover the actual administrative costs for the activities of the national competent authority in managing the authorisation system.

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B) [Domestic Regulation: Preliminary discussion paper](#) - 5 June 2001

c) [ESF Commentary on Domestic Regulation Draft Disciplines by WTO WDPR Chairman](#) – July 2007

<sup>5</sup> [See Annual reports of the Working Party on Domestic Regulation to the Council for Trade in Services \(2017 & 2018\)](#)

- Processing of Applications: The processes of application should be as simple as possible to achieve the intended aim, and the least burdensome as possible. Authorities should accept electronic applications and accept duly recognized copies of original documents;
- Informing Applicants of Status of Applications: All regulatory authorities should have clear process in place for informing the applicant of their status of application, and keeping them informed in good time, following a due diligence process.
- Entry into Effect of Authorization: the applicant should be informed on the exact timing of the entry into effect of the authorisation granted.
- Assessment and Recognition of Qualifications: When the assessment of a qualification is required, the recognition procedure should be transparent, contain a well-defined appeal and review process, and a clear and reasonable timeframe should be determined.

### c) **Independence of the regulatory bodies**

- In network or infrastructure sectors such as telecommunications or financial services, the disciplines should require that all regulatory bodies shall be separate from, and not accountable to, any service providers that they regulate. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.
- In other sectors like professional services, where a regulatory body is in charge of authorizing the supply of a service, the disciplines should require that the competent authorities adopt their decisions in an independent and impartial manner.

## 3. The next steps

The European Services Forum calls on the largest number of WTO members to adopt the disciplines and to include them into their own national GATS Schedule of Commitments as additional commitments, so that they become legally binding disciplines.

It will be important that these disciplines will be adopted by the whole WTO Membership, and hence will be part of the multilateral rules. However, should this not be possible, due notably by the rejection of such disciplines by a certain number of WTO members that expressed their diverging position in Buenos Aires, ESF urges the participating countries to move ahead on a plurilateral basis. ESF shares the concern expressed by some participants who consider that there is a need to have a critical mass of countries for them to accept to undertake new legally binding commitments on a most favoured nation basis. ESF considers however that we are not here in a configuration where possible “free riders” would benefit from such disciplines. The clear beneficiaries of such disciplines will be the countries which would have clear commitments in domestic regulation that would make conditions ripe for foreign direct investors to create growth and jobs on their markets. ESF therefore calls for the disciplines to be granted on a Most Favoured Nation (MFN) basis.

Another important issue related to such disciplines, as it will significantly determine the real value of the new agreement, is the scope of the new disciplines. GATS Article VI.1. states “In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.” And since the current the negotiation of disciplines on domestic regulation are pursuant to the mandate contained in Article VI:4 of the General Agreement on Trade in Services, many countries consider that the new disciplines should apply only to the committed sectors in their GATS schedule of commitments.

But there is an important discrepancy among WTO members on the number of sectors committed, including among the participating countries. At the end of the Uruguay Round, it was essentially the

developed countries that took commitments for a large number of services sectors and sub-sectors, while developing and least developed countries took limited, very limited or no commitments at all. It is also acknowledged that recently acceded countries have taken more commitments than founding members of the WTO.

The European services industry would obviously like to get bigger and better market access in all WTO members. But ESF would like to warn against the risk of stalling the discussion on Services Domestic Regulation by linking the adoption of new disciplines to a hypothetical revival of the WTO market access negotiations. ESF would recommend therefore, at this stage, to keep the scope of the disciplines to the existing commitments so as to gather a large group of signatories.

The momentum created by the Joint Ministerial Statement on Services Domestic Regulation in the fringe of the 11<sup>th</sup> WTO Ministerial Conference should be preserved and transformed into a new set of disciplines, contributing to maintain the negotiating function of the World Trade Organisation.

Therefore, the European Services Forum calls upon WTO Members to engage in the coming months in final negotiating phase towards the adoption of WTO Disciplines on Services Domestic Regulation by the Twelfth WTO Ministerial Conference in June 2020.

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## **List of ESF Members Supporting the above Position**

- Accountancy Europe
- Amfori
- Architects' Council of Europe – ACE
- British Telecom Plc
- BDO
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- BUSINESSEUROPE
- BUSINESSEUROPE WTO Working Group
- Danish Shipping
- Deutsche Telekom AG
- Deutsche Post DHL
- DI – Confederation of Danish Industries
- Digital Europe
- EK - Confederation of Finnish Industries
- EuroCommerce
- European Banking Federation – FBE
- European Community Shipowners' Associations – ECSA
- European Express Association – EEA
- European Federation of Engineering and Consultancy Associations – EFCA
- European Public Telecom Network – ETNO
- European Savings Banks Group – ESBG
- European Satellite Operators Association – ESOA
- European University Association – EUA
- Fédération de l'Industrie Européenne de la Construction – FIEC
- FratiniVergano European Lawyers
- HSBC Group
- IBM Europe, Middle East & Africa
- Inmarsat
- Institute of Chartered Accountants in England and Wales - ICAEW
- Insurance Europe
- Irish Business and Employers' Confederation - IBEC
- Law Society of England & Wales
- Le Groupe La Poste
- Microsoft Corporation Europe
- Mouvement des entreprises de France – MEDEF
- Oracle Europe, Middle East & Africa
- Orange
- PostEurop
- Prudential Plc.
- Refinitiv
- SELDIA – European Direct Selling Association
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- Telenor Group
- UPS
- Vodafone
- Zurich Financial Services