

BAK Position Paper



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Subject: Movement of Natural Persons (Mode 4) under GATS: an assessment of the current negotiations

1. Introduction

The submission of an EU draft offer in the current GATS negotiations on 6 February 2003 marks a shift in the main thrust of the political discussion on GATS. Up to then, the issue of liberalization/privatization of public services via GATS was at the forefront of critical public debate; since February, the discussion in the EU has noticeably shifted towards the issue of free movement of workers or rather the mobility of workers. This goes in particular for those representing workers' interests – trade unions and chambers of labour – given that they are directly affected in addition to the relevant civil society, although there are also clear North-South aspects contained in this debate.

The aim of the following statements therefore to first make several conceptual comments on the debate concerning the mobility of workers under GATS, secondly to highlight the various interests in the current negotiations, thirdly to outline the EU offer for Mode 4 and finally to present cornerstones of a political positioning for worker's representatives concerning further GATS Mode 4 liberalization.

First and foremost is the ascertainment that in the following it is not about finding arguments against the immigration of persons from third countries in the service of a nationalistic and xenophobic policy. It is also not about shielding the labour market from the outside. However, what it is about is the fact that economic migration and its regulation should be orientated to the requirements of the respective labour markets. Secondly, we need to ensure that it does not lead to discriminatory treatment with regard to wages and working conditions between native workers and – permanent or temporary – migrant workers. This is in keeping with the legitimate protection of everyone's interests – those of migrant as well as local workers – and is the central task of workers' representations.

2. Mode 4 liberalization from a worker perspective: some conceptual remarks

If we assume that we need immigration in Europe for economic reasons from a medium-term and long-term viewpoint – we then really need to discuss a possible further

liberalization of Mode 4 with regard to the following question: what advantages and disadvantages does a model of temporary labour migration have compared with a immigration policy aimed at integrating foreign workers on a permanent basis, and what advantages and disadvantages could a multilateral regulation framework have here compared with unilateral and bilateral regulations. These are complex questions that I cannot address properly as part of this paper. Nevertheless, I think a more profound debate is extremely urgent especially for workers' representations, but also in civil society at large.

With regard to this, the following arguments in favour of liberalizing Mode 4 have been put forward:

1. The opportunity to react flexibly to temporary labour shortages at home in certain service industries (say: tourism, health care) by importing additional staff from abroad;
2. The costs for the general public caused by the usage of public and social services would be comparatively low in the case of mode 4 migrants in contrast to permanent immigrants; thus, one would save on the social costs of integrating foreign workers in the event of permanent integration;
3. Brain drain from the South to the North would be noticeably smaller in the case of temporary Mode 4 migration than with permanent migration; Conversely it should be assumed that Mode 4 migration would lead to a know-how transfer to the South, once mode 4 migrants return to their countries of origin.

On the other hand, the trade unions have raised the following objections:

4. Mode 4 workers are often exposed to poorer working conditions than native workers, and are more prepared to accept these because of the relatively short period of employment abroad;
5. A trade union organization and representation of Mode 4 workers is barely possible or at the least significantly more difficult than in the case of permanent workers owing to the short-term nature of the stay abroad and the pressure exerted by the employer;
6. Serious abuse of the deployment of Mode 4 workers is preordained, with domestic employers using Mode 4 workers on a rotating basis via sub-contracts;
7. The negotiating power during labour disputes and wage negotiations is shifting more and more in the favour of the employer, with the increased use of Mode 4 workers as substitutes to home workers hanging in the air as a threat;

A detailed review of these for and against arguments is extremely difficult because of the considerable lack of empirical studies. However, recent examples in the context of mobility of workers within Europe or the so-called bilateral trainee agreements (e.g. between Austria and Hungary) have shown that we are faced with a serious practice of abuse that calls for effective control by the authorities. For instance, the introduction of the internal market for services within the European Union and the bilateral agreements of Germany with the now EU-accession countries in the beginning of the 1990s had a severe impact on the labour market in the German construction industry. Within a few months a significant amount of foreign subcontractors entered the German market (then with already more than 300000 posted workers). In theory those companies were construction companies but in fact they were nothing else but temporary work agencies providing cheap workers in a rotating system. While the migrant workers were paid wages insufficient for coping with high living costs in Germany, they were cheated through high wage deductions for accommodation, transport, broken tools etc.. Nor were payments properly effected into the social security and tax systems of both - recipient and exporting - countries. The profits gained from this lucrative business usually were transferred to bank accounts in tax-havens. Thus, the results were a permanent pressure on wages with the aim of eroding collective bargaining arrangements, a significant loss in well-paid jobs, and the evolution of cascade systems of sub-contracting firms in order to immunize employers from legal

claims from the part of workers, trade unions and the general public.¹ Quite similar experiences have been made in the Austrian construction industry.

From the viewpoint of the workers' representations, it seems hence fairly clear that a lot speaks for permanent immigration and little for significant Mode 4 liberalization. This is for social and political considerations as well as economic ones. From the South-North perspective, the situation appears not so clear. As regards the brain drain problem, an argument can be stated in favour of Mode 4 migration. However on the issue of return remittances for income obtained during the stay abroad, it is to be assumed that migrants living permanently abroad can send higher sums back home than temporary Mode 4 workers. On the one hand because they can spread the travel and relocation costs over a longer period, on the other because it is to be assumed as a rule that the income will rise the longer the worker stays abroad. Hence a greater percentage can be sent back to support the relatives who have stayed behind in the country of origin.

3. The current GATS negotiations on Mode 4

3.1. General Economic Situation

The negotiations that are now beginning on Mode 4 are embedded in an economic situation in the EU that is characterised by a host of negative factors. These include (i) the current recession, which threatens to turn into a deflationary or depressive trend, (ii) high unemployment, which is being further increased by the recession, (iii) EU enlargement, which will also burden the labour markets in the EU, particularly in Germany and Austria. In addition to this extremely gloomy economic outlook is the fact that European and national economic policy in the member states still subordinates the outlined macroeconomic challenges to a rigid monetary and budgetary policy. Instead, solutions for prevailing economic problems are still sought by applying notorious policies market flexibilisation and deregulation, not least the labour markets. It is clear that against this background, the current negotiations on Mode 4 liberalization have attained special political sensibility.

3.2. Interests in the negotiations

There are several interests present in the current negotiations. In the industrial countries, the representations of interests of large international service groups, particularly the European Services Forum, support more extensive commitments among the higher qualified workers. To this end, they are calling for easier access through more transparent and more efficient entry provisions and the introduction of a separate visa category (GATS Visa).

The developing countries see considerable economic and social benefits in the liberalization of Mode 4. There are several reasons for this:

- Firstly, quite a few newly industrialised countries and emerging economies, respectively (e.g. India, Brazil, South Africa) have competitive exporters in several sectors (IT services, engineering). However, these exporters are not able to set up branch offices extensively abroad for lack of capital. Yet they are very much able to fulfil service contracts through the posting of qualified staff to the importing country.
- Secondly, there are a number of traditional export countries of poorly qualified workers or unqualified workers (e.g. the Philippines, Jamaica) in mostly labour-intensive industries such as transport, construction and tourism, care professions and in the area of cleaning services. Strengthened by the economic crisis as a result of IMF/WorldBank structural adjustment policy and the financial crises of the

¹ My thanks go to Frank Schmidt Hullmann for providing this information.

1980s and 1990s, there is a growing number of countries from the South that have a considerable interest in exporting their own excess-labour, particularly in order to acquire much needed currency revenue because of the income transfer expected from workers sent abroad.

For these reasons, these countries call in particular for the liberalization of Mode 4 also for self-employed service providers on a contractual basis (Contractual Service Suppliers, CSS), the reduction of administrative and technical access barriers to national labour markets, exceptions regarding obligatory contributions to social security funds if there are no bilateral reciprocal agreements etc..

3.3. The EU offer on Mode 4

The supply of services through the temporary migration of natural persons (Mode 4) has always been a key topic for European trade unions in the context of GATS. Up to now, liberalization in the EU in this area was limited to the mobility of key personnel and specialists within a company as well as a closely defined number of so-called contractual service providers without branch offices in the EU. The European Commission now proposes a number of substantial liberalizations. In detail:

- a) Mobility within a company (intra-corporate transferees ICTs): on the one hand, it proposes extending the maximum duration for key personnel dispatched to the target country to three years. On the other, it proposes enlarging the category of ICTs: the category “Graduate trainees” – i.e. persons with a university degree – should be able to be dispatched to a foreign subsidiary or parent company for a maximum of 12 months for the purpose of career development or training purposes.

Assessment: The offer for trainees should be deemed problematic because of the broad definition – what are “career development purposes”? – and the growing threat of abuse associated with it. In addition, we should call into question whether cross-border transfers for internal training purposes fall into the remit of GATS at all. For the cross-border movement of persons under the GATS can only take place in connection with the supply of a specific service. With transfers for purposes of career development or training, this is only the case – if at all – to a very limited extent – except when the employee concerned is deployed based on normal performance levels, which would however constitute improper use. The proposed extension does not therefore conform to the agreement and could constitute a dangerous precedent with regard to the general opening of the labour market by GATS.

- b) Mobility of workers based on a service contract (Contractual Service Suppliers, CSS):
- i. Employees of companies without a branch office in the importing country (EIPs): these persons are sent to the importing country for the purpose of supplying a service. Previous commitments in this area were limited to a few industries, for instance accounting, bookkeeping, tax advisory, travel agency and entertainment services.

The European Commission now makes the following offer:

- The European Commission proposes the following definition for this group of persons with regard to necessary qualifications: university degree or equivalent technical qualification (addendum: “demonstrating knowledge”), relevant vocational training if required by law as well as at least 3 years’ work experience in the relevant sector;
- Extend the permissible length of the service contract to 12 months (currently 3 months)

- Extend the permissible length of stay for foreign workers to 6 months cumulatively over a period of 12 months (up to now: 3 months over 12 months)
 - Extend the sectors admissible for mobility of workers from 5 to around 20 sectors in total, among them for example legal services, architecture, urban and landscape architectural planning, computer services, R&D, planning/surveying work prior to construction, environmental services, translation services.
- ii. Independent Professionals, IPs: the European Commission defines this new group of persons as follows:
- University degree or equivalent technical qualification (addendum: “demonstrating knowledge”), relevant vocational training if required by law as well as at least 6 years’ work experience in the relevant sector;
 - The European Commission offers a liberalization commitment for the following sub-sectors: architecture, urban planning and landscape architectural planning, engineering services, computer services, management consulting and related services, translation services.

Assessment of i. and ii.: This offer means a considerable increase in competition for the cited services industries. Even if the EU demands strict adherence to all labour, social and wage policy regulations of the importing country, it is questionable whether control of the adherence to national labour and social law regulations is possible owing to the non-existence of a branch office or subsidiary of the foreign company in the EU, the short-term nature of the stay as well as the lack of trade union organization for the workers dispatched. In addition, an effective review of whether the remuneration agreed with the worker dispatched corresponds with national collective wage agreements and minimum wages is de facto not possible. Foreign service providers thus have a considerable cost advantage when setting prices. Provided that access of these workers is not hindered by (hidden) national regulations or administrative burdens (e.g. with regard to the recognition of professional qualifications), which would make the effective fulfilment of a service contract in the EU considerably more difficult, a significant increase in competitive pressure in the industries concerned is to be expected through the proposed Mode 4 openings. This would result in pressure on the work and wage conditions of domestic employees, and could also lead to increased unemployment among higher or highly qualified workers in the medium and long term in the EU.

This offer also includes the European Commission’s plan to replace the existing Economic Needs Tests (ENTs) with a quota regulation. ENTs are a restrictive instrument difficult for outsiders to understand that carry out a test of the actual need for a foreign worker for each individual application. As far as the theory of liberal trade as well as other WTO members affected by this are concerned, it is simply to do with a non-tariff trade barrier that needs to be removed or at least replaced by a more transparent tariff trade barrier.² Accordingly, the European Commission suggests defining a numeric quota for the admission of CSS and establishing this in the EU list of commitments. The quota should be determined according to the total population (a number X per 1 million inhabitants), be divided among EIPs and IPs respectively, and an upper limit of admissions should also be specified for each industry. In accordance with the negotiating logic of GATS, this means that the quota -once specified- establishes de facto a lower limit that would be the object of further demands for increases in the following trade rounds.

A number of objections can be put forward against this Commission proposal. The most important one refers to the lack of any labour market criteria when determining the quota. In addition, were the quota established irrevocably for a relatively long period, it would be

² Also Winters, L.A./Walmsley, T.L./Wang, Z.K./Grynberg, R.: Negotiating the Liberalization of the Temporary Movement of Natural Persons, Discussion Paper 87, Department of Economics, University of Sussex 2002, (<http://www.sussex.ac.uk/Units/economics/dp/Wintersetal87.pdf>).

scarcely possible to react flexibly to changes in the labour market situation. In addition, the Commission's intention of establishing the quota at EU level makes a differentiated approach to the situation on national and regional labour markets considerably more difficult.

The quota proposal presented by the Commission for the first time on 24 March has therefore led to a controversial discussion between the Commission and the EU Member States, and has delayed the submission of the initial EU offer to the WTO in Geneva until the end of April 2003.

4. Cornerstones for a political strategy concerning further Mode 4 liberalization from a worker's perspective

The current economic situation, above all with regard to employment, suggests a restrictive approach towards liberalization for Mode 4 workers. We should stick to this fundamentally restrictive line, even if the economic situation were to improve in the years to come. A possible additional demand for foreign workers originating from demographic reasons should be covered above all by policies directed at permanent immigration. Possible demand peaks for foreign workers resulting from an economic boom in the EU should preferably be met through flexible unilateral regulations and not through GATS Mode 4 liberalization.

However, if one assumes realistically that an EU offer for Mode 4 in the current GATS negotiations cannot be prevented as such, then the following considerations might provide a rough outline for a political positioning of trade unions:

- From an employment viewpoint, particularly problematic industries (e.g. construction and engineering services) should not be opened up at all;
- Any Mode 4 liberalization should be restricted to highly qualified workers only;
- Controlled management of Mode 4 immigration by ENTs or quotas is indispensable in order to avoid labour market shocks;
- We should not blindly do away with ENTs in favour of a blanket quota solution – a mixture of ENTs for problematic industries and quotas for other industries would seem to be more advantageous;
- Provided that a quota regulation is implemented by the EU, we should see to it that (i) the quota is orientated to the situation on the labour market, (ii) the quota is fixed by the Member States in order to take into account regional peculiarities, (iii) the quota is reassessed every 1-2 years dependent upon the trend on the labour market, and (iv) automatism for increasing the quota in successive negotiation rounds is explicitly ruled out;
- A safeguard clause should be introduced in the event of exceptional, serious disturbances of the national labour market;
- The unique strains on the labour markets of Austria and Germany as a result of EU enlargement should receive special consideration from both countries vis-à-vis possible Mode 4 liberalization;
- Accompanying measures for any partial Mode 4 liberalization must include: (i) monitoring the development of industries affected by Mode 4 liberalization, (ii) an effective review of the access and qualification prerequisites as well as the relevant use of foreign workers, and (iii) the establishment of stringent and credible control and sanction mechanisms in case of abuses by the relevant authorities.

It is clear that the effects of Mode 4 liberalization might be easier to digest the better the economic situation is, the more complementary immigration of foreign workers is with domestic workers, and the more (pro)active the national labour market policy reacts with increased training and qualification measures for workers affected. All this has admittedly not been fulfilled or barely been achieved at present in the EU.

At the moment it remains, however, to be seen, how WTO member states respond to the EU offer on services liberalization. Though officially touted by EU-authorities as a far-reaching commitment in the interest of Developing Countries, the Doha Round negotiations in general seem to have come to a halt for the time being. Thus, the fate of the GATS negotiations will critically depend upon the overall advancement of the Doha Round and thus upon external though interrelated factors, in particular agriculture, investment and TRIPs. Many Developing Countries have made it clear that progress in the agriculture negotiations is being seen as a conditional prerequisite for the services' talks. For the time being, any substantial progress in the negotiations before the 5. Ministerial Conference in Cancun next September remains improbable. Cancun will thus be a decisive event for the fate of both GATS and the whole Doha liberalization agenda.