



International
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Centre



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LDC Services: Geneva Practitioners' Seminar Series on Making Sense of
the GATS and Applying Good Practices in Services Negotiations

Seminar 5: “Services in bilateral, regional and plurilateral negotiations: implications for the GATS and for LDCs”

Session 1: Services in FTAS: Evolving Structure, New Directions

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*“Mode 4: Broadening the scope and categories of commitments and supportive
regulatory approaches”.*



Outline

- **Recalling key definitional aspects:**
- **Key trends in the scope of mode 4 GATS commitments:**
- **Broadening the scope- evidence from Economic Integration Agreements:**
- **Thoughts on regulatory approaches to enhance mode 4 commitments:**
- **Other key considerations:**
- **Parting shots.**

Recalling key definitional issues

- Art. 1 (2) (d);
 - ✦ The supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.
 - ✦ Person can be natural or juridical ;
 - ✦ Natural person can be a service supplier or an employee of a service supplier (Mode 4 Annex)
 - ✦ Categories commonly scheduled: Contractual Service Suppliers, Intra-Corporate Transfers, Independent Professionals, Business Visitors.

Other key aspects of Annex on movement of natural persons:

- Non-application to persons seeking access to employment market, measures regarding citizenship or employment on a permanent basis.
- Agreement not to prevent application of measures to regulate entry and stay provided they do not nullify/impair benefits from commitments.

Key Trends in the Scope of Mode 4 GATS Commitments: The Horizontal Section

Sector or sub sector	Limitations on market access	Limitations on national treatment	Additional commitments
1. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	<p><u>Categories of natural persons covered under Mode 4. Unbound except for measures concerning the entry into and temporary stay of the following categories:</u></p> <ul style="list-style-type: none"> (i) Intra-Corporate Transfers (ICTs): (ii) Business visitors: <ul style="list-style-type: none"> a) Service sellers; b) Establishment of commercial presence; (iii) Contractual Service Suppliers. 	<p><u>Categories of natural persons covered under Mode 4. Unbound except for all categories of natural persons referred to and committed in the market access column.</u></p>	

Key Trends in the Scope of Mode 4 GATS Commitments: The Sector-specific Section

Example from the EU schedule	
Limitations on Market Access	Limitations on National Treatment
II. SECTOR-SPECIFIC COMMITMENTS	
1. BUSINESS SERVICES	
LEGAL SERVICES (CPC 861)	
<p><u>Mode 4: ICT and BV</u></p> <p>All Member States (except Cyprus, Luxembourg and Malta) are unbound for ICTs and BVs except as indicated in the horizontal section. Salient specific limitations include the following:</p> <p>Citizenship and residency (Finland)</p> <p>Nationality (Greece, Latvia and Poland)</p> <p>Language requirements (Latvia)</p> <p><u>CSS</u></p> <p>All Member States with the exception of Germany and UK make no commitment for CSS. Salient specific limitations include the following:</p> <p>University degree and professional qualifications and three years' professional experience in the sector (Germany and UK)</p>	<p><u>Mode 4: ICT and BV</u></p> <p>All Member States (except Cyprus, Finland, Latvia, Malta and Poland) are unbound except as indicated in the horizontal section. Salient specific limitations include the following:</p> <p>Foreign legal advisors required to be members of their national Bar Association (Austria)</p> <p>Limitations on marketing (Denmark)</p> <p>National licence, national exams. (Denmark)</p> <p>Membership to national bar associations. (Sweden)</p> <p>Citizenship and residency.(Sweden)</p> <p>Finland, Latvia and Poland have no national treatment limitation.</p> <p>Cyprus and Malta are unbound.</p> <p><u>CSS</u></p> <p>All Member States (except Cyprus, Czech Republic, Hungary, Malta, Lithuania, Poland, Slovak Republic and Slovenia) limit access to what is contained in horizontal section.</p> <p>Cyprus, Czech Republic, Hungary, Malta, Lithuania, Poland, Slovak Republic, and Slovenia make no commitment for CSS.</p> <p>Latvia has no limitations for CSS.</p>

Key findings

- **Very narrow scope- initial unbound, only for certain categories with additional conditions- both horizontal and sector specific;**
- **Limited categories covered;**
- **Some non-clarity in scope of access granted: H.S says: *Unbound, except for the categories of natural persons included* ; S.S says: *Unbound, except as indicated in the horizontal section*;**
- **Limitations such as citizenship, residence, nationality, examinations, ENTs;**
- **Seemingly only covers highly-skilled service suppliers;**
- **Comparably more limitations on CSS: link to commercial presence, pre-obtained contract, contract obtained by open tendering process, no more than 3 months, access is solely for contract not to practice the profession, high minimum qualifications (degree and 3-5 years experience depending on MS)**
- **Utilization subject to compliance with national laws including on period of stay;**
- **Unclearity in depth of NT concession; i.e. unbound except as indicated in horizontal section: H.S: unbound except for MA categories;**
- **Cases of disconnect between MA and NT;**
- **Overall assessment? Need for improvements of H.S and more liberal commitments in sectors as well as overall improvements of a scheduling clarity nature.**

Broadening the scope- evidence from the EU-CARIFORUM EPA: Definitional and horizontal issues:

Issue	Treatment in EU schedule	Treatment in EU-Cariforum EPA	Does EU go further than the GATS?
1. Definitional aspects of natural persons			
Key personnel (BVs and ICTs)	Not referred to as key personnel, but sub categories of ICTs and BVs exist and are grouped together as a category. ICTs also include senior persons in a juridical person or persons possessing uncommon knowledge	Referred to as Key personnel. Definitional detail similar.	No, definitions are similar.
Graduate Trainees	There is no category for graduate trainees in the EU GATS schedule.	Natural persons employed by a juridical person of the Parties for at least one year, possessing university degree and temporarily transferred to a commercial presence or to the parent company of the juridical person in the territory of the other Party for career development purposes or to obtain training in business techniques or methods.	Yes, to the extent of new category added.
(Business) Service sellers	It is a subset of BVs. Horizontal requirement for Estonia and Sweden for prior employment of the service seller for at least one year immediately before application date.	Similar definition but no horizontal requirement for prior employment for one year preceding application.	Yes, to the extent of a blanket EU definition with no country limitations such as existing on requirement for prior employment.
CSS	Employee of juridical person that has obtained a service contract in the EU of not more than 3 months.	Similar definition. Contract not exceeding 12 months.	Yes, to the extent of longer period for CSS contract. (i.e. longer by 9 months)
ITC IPs	There is no category for IPs in the EU GATS schedule.	Self-employed natural persons that have obtained a services contract.	Yes, to the extent of addition of new category.

Broadening the scope...

Treatment in EU schedule	Treatment in EU-Cariforum EPA	Does EU go further than the GATS?
2. Horizontal requirements for CSS		
The service contract must not exceed 3 months.	The service contract must not exceed 12 months.	Yes, to the extent of difference between 3 and 12 months (9 months)
In some Member States (such as Estonia and Latvia) services consumer for whom the CSS moves must be engaged in substantive business operations.	No such requirement.	Yes, to the extent of absence of requirement for engagement in substantive business operations.
Requirement that the service supplier must have obtained the contract through an open tendering procedure.	No such requirement.	Yes, to the extent of removal of restriction related to contracts having been got through one process only.
Requirement that CSS must have worked for the juridical person for the year preceding application/movement, (or two years in the case of Spain)	Requirement that CSS must have worked for the juridical person for the year preceding application/movement.	No to extent that requirement is similar. Yes to extent of no horizontal requirement by specific countries for additional time.
Stay shall be no more than 3 months in any 12 month period (or 24 month period in the case of the Netherlands).	Stay for CSS is for cumulative period of not more than 6 months (or 25 weeks in case of Luxembourg) in any 12 month period, or duration of contract whichever is less.	Yes, to extent of difference between 6 and 3 months (i.e. 3 months)
Must possess necessary academic qualifications and professional experience	Qualifications defined to include diplomas, certificates, and other evidence (of formal qualification) issued by an authority designated pursuant to legislative, regulatory or administrative provisions and certifying successful completion of professional training. University degree if not got in the EU can be re-evaluated for equivalence.	Yes, to extent that EU GATS schedule does not define qualifications and more importantly, fact that certain sectors are granted for non-degree holders.

Broadening the scope: Sector-specific issues

Legal services (CPC 861): Key personnel (ICTs and BVs)

<u>Limitation</u>	<u>GATS</u>	<u>EPA</u>	<u>Does EU go further than GATS?</u>
Scope	Excludes EC law	Includes EC law	Yes to extent of inclusion of EC law.
Sub-sectoral exclusions	Country-specific exclusions of sectoral application e.g. Czech Republic, Estonia etc.	No country-specific exclusions of sectoral application (but other limitations remain)	Yes to extent of EU-wide application of CPC 861. No to extent of exclusion of legal advisory-which for some countries like Hungary is committed in the GATS .
Country-specific exclusions for the non-application of the commitment	<u>ICTs and BVs</u> Commitment for ICTs and BVs does not extend to Cyprus, Luxembourg and Malta.	<u>Key personnel (ICTs and BVs)</u> There are no country specific exclusions for the non-application of commitments for key personnel (ICTs and BVs)	<u>Key personnel (ICTs and BVs)</u> Yes to extent of additional scope of application of commitment to all M/S for key personnel in this context those excluded in the GATS i.e. Cyprus, Luxembourg and Malta.
Citizenship	<u>ICTs and BVs</u> Requirement in Finland	<u>Key personnel (ICTs and BVs)</u> Requirement in Finland and Belgium	<u>Key personnel (ICTs and BVs)</u> No owing to retention of citizenship requirement in Finland. No as in some cases (Belgium) condition is not in GATS schedule.
Nationality	<u>ICTs and BVs</u> Requirement in Greece, Latvia and Poland	<u>Key personnel (ICTs and BVs)</u> Requirement only for Latvia, Luxembourg, France. Greece and Poland silent.	<u>Key personnel (ICTs and BVs)</u> Yes to extent of removal of limitation by Greece and Poland for key personnel (ICT and BV). No as for Luxembourg and France limitation is not in the GATS.

Broadening the scope...

Legal services (CPC 861): Key personnel (ICTs and BVs)

<u>Limitation</u>	<u>GATS</u>	<u>EPA</u>	<u>Does EU go further than the GATS?</u>
Admission to Bar	<u>ICTs and BVs</u> No general requirement for ICT and BV to be admitted to the Bar.	<u>Key personnel (ICTs and BVs)</u> Requirement for full admission to the Bar in Austria, Cyprus, Spain, Greece, Lithuania, Malta, Romania, Slovak Republic, Belgium, Finland and Sweden	<u>Key personnel (ICTs and BVs)</u> No. Introduction of limitation which is not in the GATS.
Language	<u>ICTs and BVs</u> Requirement in Latvia.	<u>Key personnel (ICTs and BVs)</u> No language requirements for key personnel (ICTs and BVs) and graduate trainees	<u>Key personnel (ICTs and BVs)</u> Yes to extent of removal of language requirements.
Inclusion of new restrictions	<u>ICTs and BVs</u> Not applicable as it is basis for assessment	<u>Key personnel (ICTs and BVs)</u> Denmark introduces new limitation that marketing of legal advice activities is restricted to lawyers with a Danish licence (which in turn requires passing exam)	<u>Key personnel (ICTs and BVs)</u> No to extent of introduction of new limitation.

Key findings

- **Definitional issues remain largely similar conceptually;**
- **Broadening scope of categories;**
- **Longer periods of stay;**
- **Cases of removal of limitations contained in GATS;**
- **Full NT for mode 4, granted up-front where mode 3 is offered (Art.68);**

Retention of restrictions such as citizenship, residency

- **MFN clause: Any third country or any major trading economy;**
- **Assessment: broader and deeper commitments: but cases of roll-back are evident.**

Thoughts on regulatory approaches to enhancing mode 4 commitments-lessons from the Cariforum EPA

- **Dedicated chapters on regulatory framework;**
- **Mutual Recognition: sequenced from discussion, confidence building to cooperation and recognition;**
- **Transparency;**
- **Process issues: application, status updates, judicial and administrative review;**
- **QRPs, LRPs, tech. Stds apply even if not listed;**
- **Obligations have no self-executing effects;**
- **Tourism:-Anti-competitive practices, access to technology, technical assistance.**
 - **NB: Very deep and far reaching regulatory disciplines also exist in the EAC CMP + Schedule on Free Movement of Workers + Schedule on Commitments on the Progressive Liberalization of Services.**

A Model set of Regulatory Best Practices based on a step-by-step approach to accessing Mode 4 commitments

Step in Mode 4 supply process	Regulatory best practices
Issues of a general application	<ul style="list-style-type: none"> • To the extent possible, develop regulatory best practices by sector. (Cariforum EPA sector specific regulatory disciplines could provide inspiration) • Transparency, information exchange and continual dialogue in the course of implementation (e.g. Art. 118, EPA) • Single Window on Mode 4: containing all information relevant to a Member's commitment.
Looking for the Opportunity	<ul style="list-style-type: none"> • Information on several sites of opportunities for supplying services (See Regulation 12, EAC Schedule on the Movement of Workers) • Open processes for awarding contracts (EU refers to this as a means to guarantee the bona fide nature of the contract)
Eligibility to supply service/Award of contract	<ul style="list-style-type: none"> • Mutual recognition of qualifications, experience etc, where possible (See Art.11, EAC Common Market Protocol) • Co-operation amongst Members towards mutual recognition. Governments to encourage their professional bodies to collaborate with those in other countries to the aim of achieving closer approximation of qualifications. MRAs to be negotiated where feasible; (Article 85, EPA); • Afford opportunity to other Members interested to join an MRA where it exists (Art. VII (2) GATS) • Where developing countries are involved, support to their academic institutions for enriching academic curriculum, or setting regional hubs of centres of excellence, where this is feasible; • Non-application of ENTs. Where they must, clear criteria for their application and non discrimination; • Setting up skills testing facilities

A Model set of Regulatory Best Practices based on a step-by-step approach to accessing Mode 4 commitments

Step in Mode 4 supply process	Regulatory best practices
Application for visa/authorization for entry	<ul style="list-style-type: none"> • Wide publication, including on line, of all requirements relevant to granting authorization such as documentation, filing method, processing time and application fees; • Submission of full and complete application by service supplier (referred to in EPA-Art.87); • Inform applicant of status of application, without undue delay (Art. 85 (1) EPA); • Inform applicant of decision concerning application (Article 87 (1), EPA); • Maintenance of judicial, arbitral or administrative tribunals to deal with reviews (Art. 85 (2), EPA); • Where such procedures are not independent of the agency entrusted with the administrative decision concerned, Members should ensure that such procedures are objective and impartial (Art.85 (2), EPA).
Presence in territory of another Member to deliver the service	<ul style="list-style-type: none"> • Objective , transparent and efficient licensing requirements and procedures; • Objective and clear procedures for issuance of passes/work permits (See Regulation 6, EAC Schedule on Movement of Workers); • Timely issuing of licences; • Fair application of technical standards; • Application of universal service obligations.
Possibility for extension	<ul style="list-style-type: none"> • Objective and efficient procedures for renewal where possibility exists; • Maintenance of judicial, arbitral or administrative tribunals to deal with reviews/appeals where request for renewal is denied.
Ensuring exit/ return	<ul style="list-style-type: none"> • Clear rules on renewal, and end of such possibility; • Shared responsibility including with representative missions to collaborate to ensure return; • Possibility for reapplication, post expiry should be in sending country.

Other key considerations:

- Thinking through how to multilateralize regulatory approaches in EIAs:
- Discussions with regulatory authorities, private sector and other stake holders:
- A GATS Visa?
- Work on mutual recognition:
- Collaborative effort on ensuring return:
- An effective TACB package for regulatory capacity building and skills development:
- Working on protection of human rights of service suppliers.

Parting shots

- **The GATS definition of Mode 4- including its application in scheduled commitments seems narrow:**
- **Mode 4 commitments in EIAs are more enhanced and meaningful including for developing countries:**
- **The trend in enhanced Mode 4 commitments in EIAs is evident in north-south as well as south -south EIAs:**
- **There seems to be a deeper interface between trade and labour mobility in general in EIAs- which is welcome:**
- **There is need for the GATS to catch up with EIA levels and the DDA negotiations are a good tool to continue pursuing this objective:**
- **Several interesting pronouncements at the HLM on the LDC services waiver indicate that this might be an avenue for a broader scope and category of Mode 4 commitments in favour of LDCs:**
- **A detailed discussion on regulatory approaches, aimed at confidence building between and amongst Members will be central to enhancing Mode 4 commitments in the GATS:**
- **Need to treat human rights protection of service suppliers in a comprehensive manner- with a role for governments, specialized IGOs, CSOs and business – all working together.**