

Trade in IT and IT-Enabled Services: Issues and Concerns in an India-EU Trade and Investment Agreement

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List of Abbreviations

BCIS	Business and Computer Information Services
BPO	Business Process Outsourcing
CAGR	Compound Average Growth Rate
CPC	Central Product Classification
ENT	Economic Needs Test
EPF	Employee Provident Fund
ESI	Employee State Insurance
EU	European Unions
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GNI	Gross National Income
GNIE	Government not included elsewhere
ICT	Information and Communication Technology
IT	Information Technology
ITES	Information Technology Enabled Services
NASSCOM	National Association of Software Service Companies
OECD	Organisation for Economic Co-operation and Development
PF	Provident Fund
SLA	Service Line Agreements
STPI	Software Technology Parks of India
TCS	Tata Consultancy Services
TIA	Trade and Investment Agreement
WTO	World Trade Organization

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1. Introduction

In recent years, India has been increasingly entering into bilateral and regional agreements within and outside the Asian region. Whether this trend is due to the lack of progress in the WTO negotiations, particularly in areas of interest to India, or the result of competitive regionalism to counter similar agreements that are being framed by other developing countries, or whether this is on account of strategic commercial and geopolitical interests that India wishes to pursue, is open to question. But the potential gains are considerable in terms of increased market access for Indian goods and services, for factor flows to and from India and partner countries or regions, and for speeding up required internal reforms.

The India-European Union (EU) Trade and Investment Agreement (TIA) is significant given that it is India's first agreement with a major developed country bloc, which would involve discussions on several complex issues, some not currently in the WTO mandate. This prospective agreement is also significant in view of India's growing bilateral trade and investment relations with the EU and the scope for these relations to grow further.

Bilateral trade in goods between India and the EU has witnessed considerable growth in the past few decades. It has grown from a mere €4.4 billion in 1980 to reach €40 billion by 2005. There has been steady growth in bilateral goods trade at 11% per year on average between 2001 and 2005 and growth of 20% in 2005 alone. The EU is today India's largest trading partner and accounts for over 20 per cent of India's exports and imports. Bilateral trade in services between India and the EU has also grown rapidly, at an average annual growth rate of 10% per year between 2001 and 2006, with a marginal surplus for the EU in 2006. India's services exports to the EU stood at €5.1 billion in 2006, up from €3 billion in 2003, while the EU's service exports to India amounted to €6.6 billion in 2006, up from €2.7 billion in 2003. The EU and India are also important investment partners. India accounted for 1.5 per cent of the EU's exports of services and 1.4 per cent of its total imports of services in 2006. The EU is India's largest source of foreign direct investment (FDI), accounting for investment outflows worth €2.2 billion to India in 2005. FDI outflows from India to the EU have also increased, from €140 million in 2002 to €200 million in 2005. Between 1991 and 2004, Indian companies in manufacturing and in services increasingly invested in the EU market through organic and inorganic routes and this trend is likely to continue.

The relationship on both the trade and investment fronts is, however, asymmetric. India accounts for only 1.8% of EU's trade and is its 10th largest partner, in contrast to the EU's importance in India's trade flows. India accounts for less than 1% of the EU's total foreign direct investment, in contrast to the EU's significance as a source of FDI for India. Such an asymmetry suggests that India has more at stake in the

ongoing India-EU TIA negotiations as this agreement could expand and deepen India's market access in the EU, an issue that is assuming increased importance from the perspective of market diversification. But it also suggests that the EU may have a strong interest in expanding its trade and investment relations with India, through the dismantling of India's tariff and non-tariff barriers, the liberalization of India's FDI policies, and reforms in India's domestic regulations. The general view is that there is more scope for investment flows from the EU to India given the huge potential of the Indian market and the current small share of India in total FDI outflows from the EU. Thus, there are clearly mutual interests that could be served through this TIA and untapped potential that could be realized by the framing of such an agreement.

One area where there is keen mutual interest in expanding economic relations and discussing related regulatory issues is in information technology and information technology-enabled services (IT-ITES). India has a keen interest in negotiating increased and effective market access for its IT-ITES providers in the EU, both because this sector is of growing importance in India's export basket and because India is looking at the EU market to diversify away from its dependence on the US for its software services exports. India's overall exports of IT-ITES have grown between 30 to 50 per cent per year since 1991, reaching \$17.7 billion in 2004-05 and rising further to \$31 billion in 2006-07. Specifically, as regards India's relations with the EU, IT-ITES has contributed significantly to the growth in bilateral trade between India and the EU. Around one-quarter of India's exports in this sector, or \$4 billion, went to the EU in 2004-05. Indian companies have established their reputation in the EU by providing quality services and products in software. Many Indian IT companies have also established their presence in EU countries through subsidiaries and branches or acquisitions of companies, and are providing both on-site and offshore services. Several EU multinationals, including ABN-AMRO, Deutsche Bank, and AXA, have set up captive subsidiaries in India and signed contracts with leading IT majors in India for offshore services. Given the presence of significant commercial interests in IT-ITES, this is a core sector for negotiation in the India-EU TIA, where India is likely to push its export interests, as it has also done in the context of the WTO negotiations.

This paper examines the barriers affecting India-EU trade and investment relations in the IT-ITES sector and outlines issues that need to be discussed in the TIA to promote bilateral commercial interests in this area. It is based on primary as well as secondary evidence on India-EU trade and investment flows and barriers in the IT-ITES sector.

Section 2 of the paper provides an overview of the sectoral and sub-sectoral coverage in this paper based on the Central Product Classification (CPC) system that is used in the General Agreement on Services (GATS). It also outlines the understanding on the scope of coverage for the computer and related services sector under the GATS.

Section 3 is an overview of the IT-ITES sector in the EU. It focuses on recent trends and developments, the structure of this market in the EU, the nature of investment and trade regulations in this sector, and the extent of liberalization. Section 4 provides a similar overview of this sector in India with a focus on trends, developments, regulations, and the extent of liberalization.

The three subsections of Section 5 provide an overview of the trade and investment flows between the EU and the rest of the world, India and the rest of the world, and between India and the EU. The discussion highlights the significance of this bilateral India-EU relationship within the overall trade and investment flows of the two sides in this sector. The discussion also highlights the segments and modes where there are opportunities to expand bilateral relations between India and the EU.

Section 6 discusses the barriers faced by Indian IT service providers in the EU market, based on interviews with management in these companies as well as information derived from secondary sources. Some key barriers are first identified based on the interviews, following which secondary evidence is used to corroborate these findings and to highlight the associated regulations and measures which pertain to these barriers. This section also identifies the main barriers faced by Indian IT-ITES providers in India as well as barriers highlighted by EU companies in the Indian market. A distinction is made in this section between barriers at the EU-wide level and barriers faced in individual Member States. The focus is on domestic regulatory barriers in the EU and in India.

Section 7 discusses the EU's position in multilateral and regional/bilateral negotiations in the IT-ITES sector and on relevant regulatory and other issues to analyze the likely outcome for the India-EU TIA negotiations. The EU's revised offer of 2005 and its earlier Uruguay Round commitments are examined as are the EU's commitments in selected bilateral FTAs. The multilateral, bilateral, and unilateral liberalization undertaken by the EU are compared. Likewise, India's unilateral versus multilateral and bilateral commitments/offers are examined in this section.

Section 8 outlines issues and proposals pertinent to the IT-ITES sector which should be pursued by the Indian government in the India-EU TIA talks. These proposals are based on the concerns expressed by Indian industry and on an analysis of what the EU may be able and willing to negotiate as evident from its other bilateral agreements and its internal mandate. A negotiating strategy in terms of a list of priority areas to address in the negotiations is also outlined.

Section 9 outlines the domestic reforms needed to alleviate the constraints faced by the Indian IT-ITES industry in doing business with the EU and also more generally to enhance the sector's competitiveness. The Conclusion highlights the likely tradeoffs for India and the overall prospects for reaching a win-win outcome in this TIA.

2. Sectoral coverage of the IT-ITES industry

The broad coverage of the IT-ITES sector in this paper is in line with the coverage of this sector under the WTO. The sector is termed Computer and Related Services (CPC 84) under the GATS framework. The concerned CPC breakdown for this sector is as follows:

Computer and related services (CPC 84)

- Consultancy services (CPC 841)
- Software implementation services (CPC 842)
- Data processing services (CPC 843)

- Database services (CPC 844)
- Maintenance and repair services (CPC 845)

Although the paper does not always explicitly discuss the segments using the CPC-based nomenclature, this classification is implicit in the discussion. The interviews with the various IT companies also highlight the significance of these activities in their portfolio of on-site and offshore services delivered to EU clients.

There is also an Annex to the Schedule on Computer and Related Services which addresses the broader conceptual coverage of this sector, especially in light of emerging segments and technological developments. This annex, which is an “Understanding on the scope of coverage of CPC 84 - Computer and Related Services”, notes that CPC 84 covers the basic functions used to provide all computer and related services. It defines what each item within this sector means and expands upon the aforementioned list of activities (see Appendix A).

Computer programs are defined as the sets of instructions required to make computers work and communicate (including their development and implementation). Activities that are included in this sector are consulting and training, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, adaptation, maintenance, support, technical assistance, and management. The annex also expands on the meanings of some of these segments. For instance, maintenance and repair services are for office machinery and equipment, including computers; training services are for staff of clients, related to computer programs, computers or computer systems; data-related services include data processing, storage, hosting, and database services. However, the manufacture, retailing or wholesaling of computers and related equipment are not covered. Outsourced activities include contact centers, data entry, transcription, and back-office financial, administrative and other services as well as testing, analytical, research and development, and other specialized domain knowledge services.

The annex makes two important points regarding the scope of this sector. First, it recognizes that technological developments have increased the offering of these services as a bundle or package of related services. Hence, the annex notes that services such as web or domain hosting, data mining, and grid computing can consist of a combination of computer services functions. Second, the annex explicitly covers different modes of delivery for all these services. It notes that all the above computer and related services are covered regardless of whether or not they are delivered via a network, including the internet, which means that both on-site and offshore forms of delivery, i.e., Modes 4 and 1 are covered.

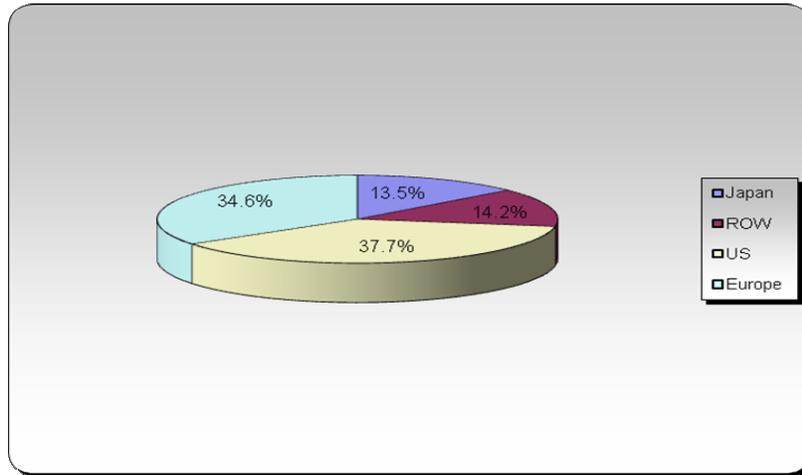
3. Overview of the IT-ITES sector in the EU

This section briefly discusses the nature of the IT-ITES industry in the EU to provide a context for the discussion that follows on bilateral trade and investment flows between India and the EU in this sector.

3.1 Trends and developments

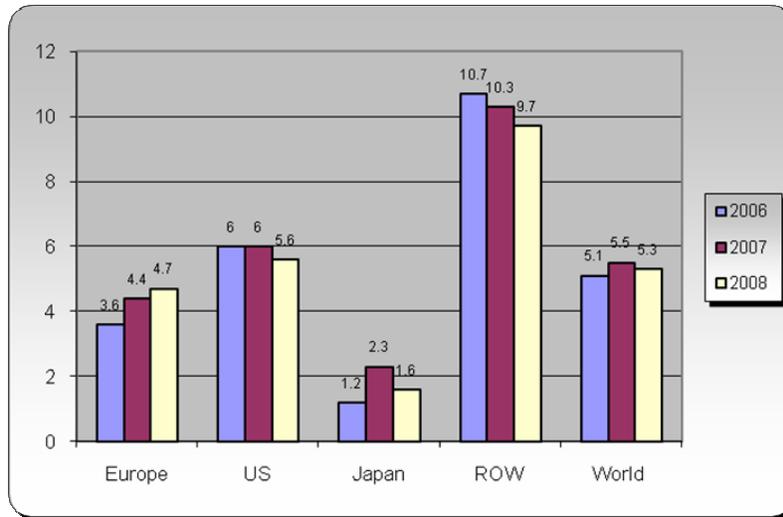
In the world market, Europe, and not merely the EU-25, accounts for 34.6% of the Information Technology (IT) market, which is slightly lower than the US at 37.7%. Although this share is for Europe as a whole and not specifically the EU, it highlights the significance of the EU in the global IT-ITES industry. The European market registered annual growth rates of 3.6 and 4.4 per cent in 2006 and 2007, respectively, lower than for the US at 6 per cent for those years. From the figures below it is clear that Europe constitutes the second most important regional market after the US in the global IT market.

Figure 1: Worldwide IT market by region, 2007



Source: Reproduced from European Information Technology Observatory (2007)

Figure 2. Worldwide IT market annual growth (%), 2006-08

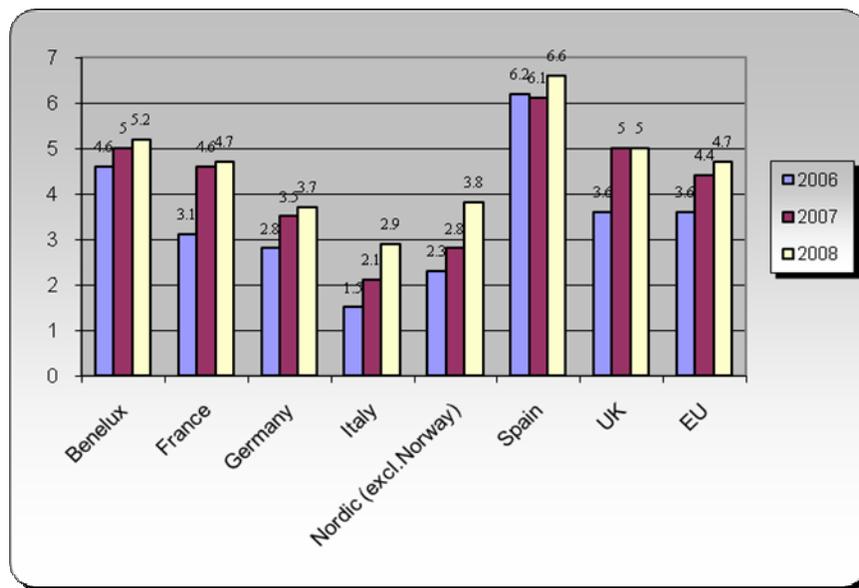


Source: Reproduced from European Information Technology Observatory (2007).

In terms of the IT industry's significance within the EU, the sector generated €150 billion in value added in 2003 for the EU-25 region, contributing around 21% to business services in the region. It employed 2.5 million persons in the EU-25 countries in 2003, equivalent to 13.7% of total business services employment in the region. The UK dominates the IT-ITES industry within the EU, accounting for 20% of the sector's value added and 25% of employment for the EU-25 region, while the Baltic States, Portugal, and Malta are among the smallest in this sector.

The average annual growth rate in the EU IT market was 2.9 per cent in 2006 and the same is expected for 2007 and 2008, lower than in the US. The highest growth market was Spain, which registered over 6 per cent annual growth in 2006 and 2007 followed by the UK and the Benelux countries. Overall, almost all the major EU member countries had annual growth rates of 3 per cent or more, as shown in the following figure.

Figure 3. EU IT market growth by major countries (%), 2006-08



Source: Reproduced from European Information Technology Observatory (2007).

As regards employment, data available for EU-25, excluding Poland, shows that in 2003, out of a total workforce of approximately 180 million, some 2.4 million (1.3%) were employed in computer and related activities and 11.3 million (6.3%) were employed in other business activities. Table 1 shows the significance of the ICT sector in manufacturing as well as services value added and employment in the EU-25 countries. Figure 4 shows the share of employment in computer and related activities within overall employment for the EU-25 member countries.

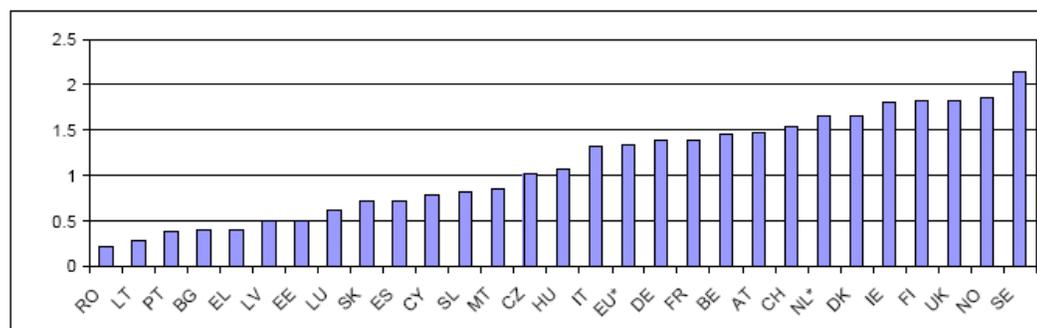
Table 1: European ICT sector, 2002

	ICT Manufacturing		ICT Services	
	Value added (€ million)	Number of persons employed	Value added (€ million)	Number of persons employed
EU-25	88720	1771106	358564	4989106
Belgium	1904	25875	11445	145370
Czech Republic	740	65697	684	43031
Denmark	1174	21662	7816	116235
Germany	20135	355099	64051	776997
Estonia	40	6104	110	6806
Spain	3484	66177	24727	405810
France	16818	297665	51365	760679
Ireland	4548	37276	2649	33790
Italy	8655	179453	40596	586034
Cyprus	3	83	454	5749
Latvia	10	675	532	16672
Lithuania	110	10575	396	19588
Luxembourg	64	1347	1254	9960
Hungary	1080	4626	2232	74560
Malta	173	3297	63	2512
Netherlands	1398	16178	16622	343849
Austria	2841	38781	8098	109140
Poland	1479	75405	2911	n.a.
Portugal	743	21494	4567	76935
Slovenia	243	n.a.	3512	n.a.
Slovak Republic	184	24428	731	31801
Finland	7251	47814	5791	86621
Sweden	992	82016	13362	221014
United Kingdom	14650	269379	97749	1114953

Note: The table uses the OECD definition.

Source: Nguyen and Genthon (March 2006), Table 1, p.5.

Figure 4: Distribution of Employment in Computer and Related Activities in Europe, 2003 (% of all employment)



Source: Huws et. al (2004), Figure 3, p. 13. Based on Eurostat data.

Note: EU average excludes Poland; Netherlands data is from 2002.

3.2 Structure of the ICT market

The EU market for information and communication technology (ICT) consists of several manufacturing and services segments. These include end-user communications equipment, computer hardware, software products, datacom and network equipment, and office equipment in the manufacturing segment, and IT and carrier services in the services segment. The IT services sub-sector accounts for 21 per cent of the overall ICT sector. Several major breakthroughs in software have been generated in Europe over the past decade. The EU region's main strengths in software services include enterprise software, embedded and distributed software, software engineering, and high-end computing.

3.3 Regulatory environment

The lack of coherence in the way legislation is implemented has led to fragmentation of the EU's ICT market, preventing companies from implementing an EU-wide strategy. Different countries work under different regulatory systems. There is, however, an EU-wide directive on data protection. This is one of the most important pieces of regulation at the EU level that is pertinent to the IT-ITES industry.

The EU Directive on Data Protection takes a regulatory and comprehensive approach to data privacy. Its objectives are to protect individuals with regard to the processing of personal information and to ensure the free movement of personal information outside the EU via the coordination of national laws. It is governed by three directives, namely, the General Directive, the Directive on Privacy and Electronic Communications, and the Directive on Data Retention. Each EU member is required to enact national laws that give effect to these directives. The primary principles on which the General Directive is based include: (1) legitimacy – personal data may only be processed for limited and legitimate purposes; (2) finality – personal data may be collected only for specified, legitimate purposes and may not be further processed for any other purpose; (3) transparency – data subjects must receive information about the processing of their personal data; (4) proportionality – personal data must be relevant and not excessive relative to the purpose for which they are collected and processed; (5) confidentiality and security – technical and organizational measures must be in place to ensure the confidentiality and security of personal data; (6) control – data protection authorities must enforce data protection laws. (See Section 6.1 (b)).

This directive is very broad as it applies to all data processing, on- and off-line, manual and automatic, and all organizations holding personal data. It establishes strict guidelines for processing personal information based on the guidelines on the protection of privacy and trans-border flows of personal data adopted by the OECD. The directive requires all personal information to be processed fairly and lawfully, such as requiring that the person whose personal information is being collected and used is informed of the proposed uses, or that the use of personal information is limited to the purpose first identified and to other compatible uses. The directive also established rules for legitimate data processing which includes obtaining the consent of the data subject before the information is processed and also providing an opportunity to the subject to see the data, correct it, or know who will receive the data when it is being processed. Certain data may be deemed sensitive and is not permitted

for processing. Technical and organizational measures are also required to protect the data against destruction, loss, change, or unauthorized disclosure or access.

The EU Directive also imposes certain institutional requirements on member countries and companies. It requires companies processing the data to appoint a data controller who must register with government authorities. The data controller must notify the government authorities before processing any data. This notification includes informing the individual of the purpose of the processing, providing a description of the data subject and of the recipients to whom the data might be disclosed, proposed transfers to third countries, and a description to ensure that basic security requirements have been met. The EU directive on data protection also requires a government authority to oversee data processing activities. Individual EU member countries are required to establish an independent public authority, namely, Data Protection Commissions, to supervise the protection of personal data by investigating and monitoring data processing activities and intervening in these activities where required.

Another important aspect of the EU data protection directive pertains to data transfers to countries outside the EU. The Directive requires that Member States enact laws that prohibit the transfer of personal data to countries outside the EU which fail to ensure adequate privacy protection. In such cases, member countries are required to take steps to prevent any data transfer to such a third country. (See Section 6.1(b) and Box A.1 in Appendix B). The Data Protection Commissions and Member States are required to inform each other in such cases. This approach is different from that of the US which uses a sectoral approach to data privacy that relies on a mix of legislation, regulation, and self-regulation. In order to avoid the complications created by the EU's approach to data privacy, some countries such as the US have entered into a "safe harbor" agreement with the EU. Certification to the safe harbor ensures that EU organizations know that the company engaged in the data processing provides adequate privacy protection as required by the EU Directive.

4. Overview of the IT-ITES Sector in India

4.1 Trends and developments

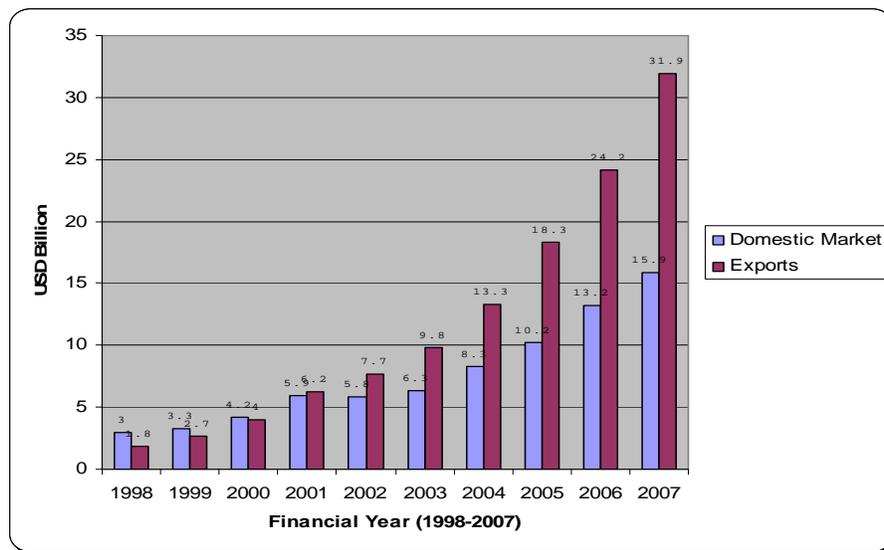
The total Indian market for IT-ITES has grown from a mere \$4.8 billion in 1997-98 to \$37.4 billion in 2005-06 and is expected to reach \$64 billion in fiscal year 2008. The sector has grown at a CAGR of over 28% since 1999-2000, with both the IT services and the ITES-BPO segments registering rapid growth. The industry's contribution to GDP increased from 1.2% in 1997-98 to 4.8% in 2005-06 and an estimated 5.5% in fiscal year 2008.

Direct employment has also grown considerably from 190,000 in 1997-98 to 1.3 million in 2005-06 and is expected to reach nearly 2 million in the 2008 fiscal year. Employment within the Business Process Outsourcing segment of this industry grew from a mere 42,000 professionals in 1999 to 545,000 in 2006-07, while employment in the software exports segment grew from 110,000 to over 700,000 during this same period, with the remainder of employment growth being accounted for by the domestic software services segment.

The Indian IT-ITES industry is highly export-oriented, with exports accounting for over two-thirds of total revenues. India’s software and IT-BPO exports stood at \$24 billion in 2005-06 and are estimated to reach \$40.8 billion in fiscal year 2008. Although IT services, excluding BPO, continue to dominate exports in this sector, the ITES-BPO segment has also grown considerably, accounting for over \$10 billion in export earnings in fiscal year 2008. India has also emerged as the most attractive offshore destination for services outsourcing in the world today, accounting for 58 per cent of the global offshore IT-BPO market in 2006-07.¹

Figure 5 shows the revenue trends in the Indian IT-ITES-BPO industry during 1999-2007 and the significance of exports in the industry’s turnover.

Figure 5: Revenue trends in India’s IT-ITES-BPO industry



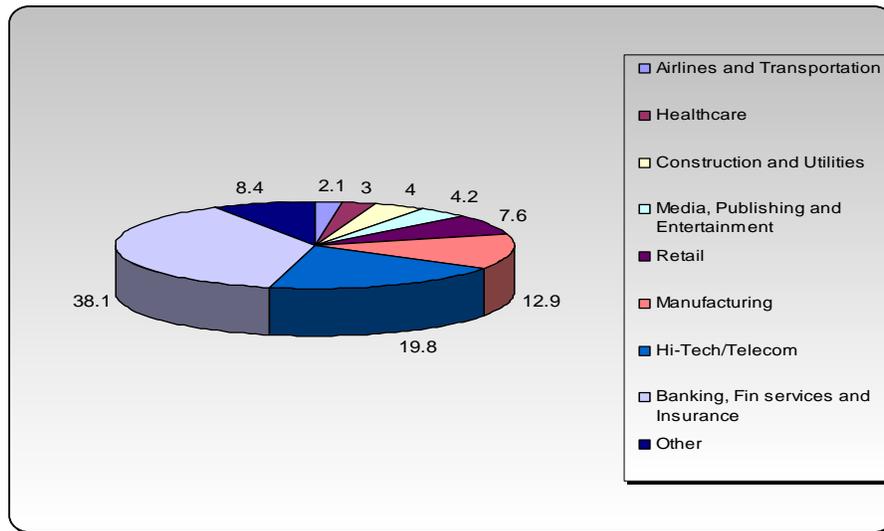
Source: Based on NASSCOM Strategic Review (2007)

4.2 Structure of the sector

Banking, financial services, and insurance are the leading vertical markets for Indian IT-ITES providers, followed by high-technology and telecom. These sectors constitute nearly 60 per cent of the country’s IT-ITES exports, followed by manufacturing and retail at another 20 per cent of all such exports, with the remainder being accounted for by a mix of service lines, including healthcare, airlines, transport, utilities, and media. These services are provided by Indian IT and BPO companies as well as large captive operations of multinationals across various industries that have been set up in India.

¹ NASSCOM Strategic Review (2007).

**Figure 6: Verticals serviced by India's IT-ITES-BPO industry
(% share in revenues)**



Source: Based on NASSCOM Strategic Review (2007).

4.3 Regulatory environment in India's IT-ITES sector

The rapid growth in India's IT-ITES sector is in large part an outcome of the liberalization of trade and investment regulations in this industry. Duties on imports of IT products have been liberalized in the post-1991 period. Relaxation of controls on both inward and outward investments and foreign exchange along with fiscal incentives provided by the Central Government and state governments in the form of tax and subsidy measures have contributed to this growth.

The major fiscal incentives provided by the Central government have been for Export Oriented Units (EOU), Software Technology Parks (STP), Special Economic Zones (SEZ) and Electronic Hardware Technology Parks (EHTP). Other benefits available to the sector are the EPCG scheme, the Star Export House Scheme & Target Plus Scheme, Services Tax Exemptions, and specific customs and excise duty exemptions for inputs and specified capital goods for IT hardware and software. The STPI program has been very effective in promoting exports in this sector. This scheme has given 100% exemption from income tax for export profits for a 10-year period, in addition to exemption from customs duties, service tax, excise duty, and rebates. The STPI has also provided basic infrastructure support and single window clearances for setting up export-oriented units. The complete liberalization of FDI in this sector coupled with the tax incentives have helped attract MNC investments into the IT-ITES industry. Deregulation in the telecom sector has also played an important role in the growth of this industry.

In addition to fiscal, trade, and investment measures, another set of policies that have been very important for this industry concerns information security. In this context, an important piece of legislation is the Information Technology (IT) Act 2000 and its amendment in 2005 to further strengthen it. Section 43-A of this act imposes a civil liability and compensation of up to Rs 5 crore for any negligence in maintaining

reasonable security practices regarding personal data or information. Section 72-A of this act imposes severe punishment for securing any material containing personal information about another person with intent to cause wrongful loss or wrongful gain and transmitting it to any person without consent. These specific laws are supported by provisions in the general laws of the country, including the Indian Contract Act and the Indian Penal Code. The following box summarizes key elements of the amendments in Section 43 of the IT Act, which are pertinent to data protection.

Box 1: Key amendments to Section 43 of the Information Technology Act

In Section 43 of the principal Act, the following section has been inserted:

43-A. Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected.

Explanation.—For the purposes of this section:

- (i) “body corporate” means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;
- (ii) “reasonable security practices and procedures” means security practices and procedures designed to protect such information from unauthorized access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit;
- (iii) “sensitive personal data or information” means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit’.

Source: The Information Technology (Amendment) Bill, 2006.

The framework of laws established by the Government has been supported by firm-level and industry-wide initiatives. Tier 1 companies have dedicated security teams and conduct periodic review and audit of security policies and practices. Most companies have documented security policies. Both Tier 1 and 2 companies sign confidentiality and non-disclosure agreements, and undertake background screening of their employees.

NASSCOM has also taken initiatives to strengthen data security. NASSCOM has launched the Trusted Sourcing initiative to reinforce India as a secure and reliable technology partner. It has also instituted the 4E framework to establish India as a reliable sourcing destination. This framework ensures the highest standard of information security in the outsourcing industry in India. The 4E framework includes provisions to (a) engage in dialogue with stakeholders at home and abroad; (b) educate companies and regulators about data protection, SLAs, security standards and practices, and industry compliance measures and build capacity in cyber safety and investigations; (c) enact measures relating to physical, network, and information security such as firewalls, employee screening, and encryption methodologies; and (iv) enforce, through reporting of software piracy, the setting up of a National Skills Registry for verification and background checks of employees.

5. Trade and investment flows in IT-ITES: India-EU Relations

5.1 EU's Trade and Investment in ICT

Information and communication services constitute a relatively small share of overall exports and imports for the EU. The following table shows the share of trade in business and computer and information services (BCIS) for selected EU member countries. The data indicate that the share is quite low and has increased only marginally for most of these countries between 1995 and 2003.

Table 2: Relative importance of services trade vs. trade in BCIS in selected EU member countries, 1995 and 2003

	Exports						Imports					
	Services in Trade		BCIS in Trade		BCIS in Services		Services in Trade		BCIS in Trade		BCIS in Services	
	1995	2003	1995	2003	1995	2003	1995	2003	1995	2003	1995	2003
Austria	35.8	32.5	13.1	12.2	37.0	37.5	30.1	31.9	11.1	15.0	36.9	47.1
Denmark	23.3	32.9	7.2	12.9	30.8	31.1	24.3	34.0	5.8	11.5	24.0	33.9
Finland	15.5	13.0	6.2	4.4	40.1	34.0	25.4	20.2	10.3	6.8	40.4	33.8
France	23.2	21.4	6.6	5.5	28.6	25.7	19.8	18.8	5.4	5.6	27.1	29.8
Germany	13.3	14.1	3.5	4.5	26.7	32.2	22.4	22.2	4.7	6.1	20.9	27.3
Ireland	12.1	29.8	2.8	16.6	27.7	55.6	26.8	50.3	10.8	21.8	40.2	43.3
Italy	20.8	19.4	4.5	5.8	21.6	30.0	22.0	20.6	6.7	7.1	30.3	34.6
Sweden	16.4	23.1	2.7	9.9	16.4	42.9	21.2	25.7	3.1	10.6	14.8	41.1
UK	24.5	33.2	5.7	11.5	23.4	34.8	20.0	24.5	3.0	4.6	14.8	18.8

Source: Welsum and Reij (2006), Table 1, p.5. Based on IMF's Balance of Payments Statistics.
Note: Numbers are in % share.

Likewise, the share of trade in business and computer and information services in total GDP is relatively low for most of these EU countries, except for Ireland, where the sector's importance in trade has increased considerably over the period 1995-2003.

Table 3: Exports and imports of BCIS as a percentage of GDP for selected EU countries, 1995 and 2003

	Exports		Imports	
	1995	2003	1995	2003
Austria	4.97	6.32	4.27	7.64
Denmark	2.61	5.84	1.87	4.51
Finland	2.29	1.66	2.99	2.10
France	1.55	1.44	1.15	1.46
Germany	0.87	1.60	1.13	1.96
Ireland	2.09	13.88	6.85	14.88
Italy	1.21	1.46	1.52	1.75
Netherlands	3.08	4.70	2.94	5.10
Sweden	1.03	4.36	1.02	3.92
UK	1.63	2.96	0.86	1.31

Source: Welsum and Reif (2006), Table 2, p.5. Based on IMF's Balance of Payments Statistics.

Note: Numbers are in % share.

The table below shows the composition of the EU's services imports in 1998 and 2004. Imports of software services are much smaller in value terms than imports of several other traditional services. The share of software services was only 3% in 2004, compared to shares of over 20% for travel and transport services.

Table 4: Composition of EU Services imports, 1998, 2004

Category	1998 (in € billion)	2004 (in € billion)	Growth rate	Percentage Share	
				1998	2004
Travel	158	223	41.5%	32%	28%
Transportation	108	174	61.2%	22%	22%
Insurance	11	22	98.7%	2%	3%
GNIE (Government not included elsewhere)	8	10	27.6%	2%	1%
Communication	10	21	103.9%	2%	3%
Construction	12	14	14.2%	2%	2%
Financial	12	30	152.5%	2%	4%
Software	9	22	143.8%	2%	3%
Royalties, copyrights & license fees	28	43	55.2%	6%	5%
Other services	122	214	75.0%	24%	27%
Total	499	787	57.7%	100%	100%

Source: Reproduced from CARIS and CUTS (2007) based on Eurostat.

In the global market for offshore outsourcing, Europe is the second most important region after the US. According to McKinsey Global Institute², within the European

² Huws et al (2005).

offshore outsourcing market, the UK holds the largest share due to its more liberal employment and labor laws, followed by Germany. Around 5% of EU establishments were outsourcing at least one business function to another market as early as 2000. However, there are considerable differences in outsourcing practices across the EU member countries. While one study found that 61% of companies in the UK were outsourcing in 2004, only 15% of their German counterparts were outsourcing offshore. According to Forrester Research, offshore service spending in Western Europe will grow from €1.1 billion in 2004 to €3.6 billion in 2009 with the UK accounting for 75% of this outsourcing by 2009. Software development is expected to constitute the main service that is outsourced. Gartner estimates a growth of 40% in the European offshore outsourcing market.³ There are also studies⁴ to suggest that offshore outsourcing is growing faster than the IT services market in Europe. However, these studies also predict that the Central and Eastern European countries will emerge as important “nearshore” outsourcing destinations with countries such as France and Germany increasingly outsourcing to the Czech Republic, Russia, Poland, and Hungary. The EU’s enlargement has made these markets more attractive destinations for offshoring. Language is an important factor in European offshore outsourcing for countries other than the UK and hence links with former colonies in various parts of the world is an important driver of outsourcing by these countries.

5.2 India’s Trade and Investment in IT-ITES

India’s software and IT-BPO exports increased from a mere \$4 billion in 2000 to around \$24 billion in 2005-06 and are estimated to have crossed \$31 billion in the 2007 fiscal year. IT-ITES services registered growth rates of over 50% in exports in the 1990s and grew by over 30% per year in 2005-06 and 2006-07.⁵ Between 2000 and 2006, there was a 485% increase in IT-ITES exports while the output of this sector grew by 339% over the same period. Given such rapid growth in exports and output, the industry’s share in India’s total services exports has grown from only 10% in 1995-96 to around 50% today and India’s share in the world market for IT services (including BPO) rose from 1.7% in 2003-04 to 2.3% in 2004-05 and further to an estimated 2.8% in 2005-06.⁶

IT services, excluding BPO, account for the bulk of exports (55%) in this industry. However, the ITES-BPO segment has also grown considerably, at an annual rate of 37% and 33.3% in 2005-06 and 2006-07, respectively, accounting for \$8.3 billion in export earnings in 2006-07. This segment is expected to continue growing rapidly, to reach an estimated \$30 billion by 2010.⁷ India has also emerged as the most attractive offshore destination for services outsourcing in the world today, accounting for 58 per cent of the global offshore IT-BPO market in 2006-07.⁸ The following two figures highlight the composition of India’s IT-ITES exports by types of activities.

³ Ibid.

⁴ For example, McKinsey Global Institute (2004), Parker (2004), and Peynot (2005).

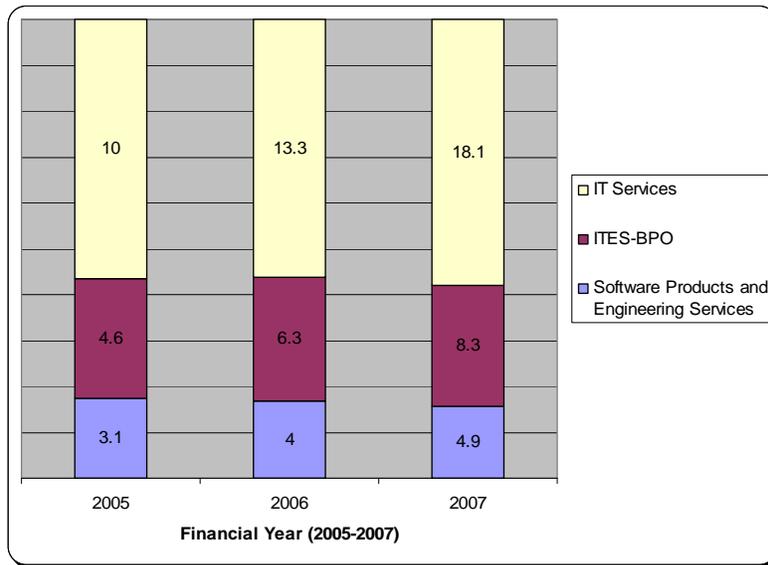
⁵ NASSCOM sources and IBEF (2006).

⁶ IBEF (2006), www.ibef.org

⁷ NASSCOM Strategic Review (2007).

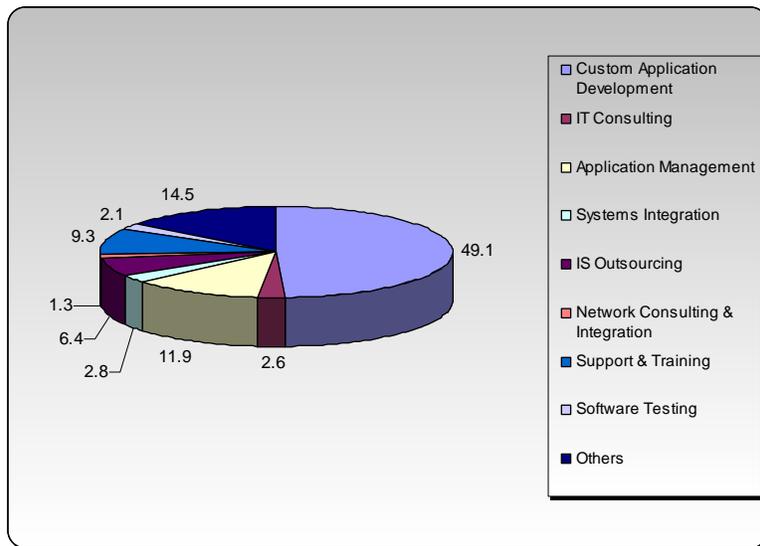
⁸ NASSCOM Strategic Review (2007).

Figure 7: Segment-wise export revenue trends in the IT-ITES-BPO industry



Source: Based on NASSCOM Strategic Review (2007)
 Note: Numbers are in USD billion.

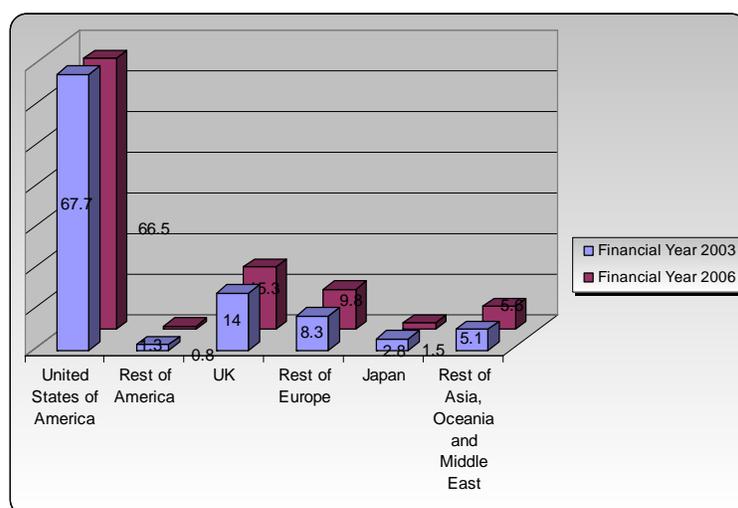
Figure 8: Composition of India's IT services exports (% share)



Source: Based on NASSCOM Strategic Review (2007)

India's IT-ITES exports are, however, concentrated in a few countries. The US is the most important destination market accounting for over two-thirds of total exports in this sector. It is followed by the UK which accounts for another 14 to 15 per cent of India's total IT-ITES exports. Europe as a whole (not the EU specifically and excluding the UK) accounts for around 10 per cent of exports in this sector. Thus, Europe as a region is second to the US, with a share of some 23 per cent as a destination market for India's IT-ITES-BPO exports.

Figure 9: Export destinations of India's IT-ITES exports (2003, 2006)



Source: Based on NASSCOM Strategic Review (2007)

In the near future, the Asia-Pacific region and the Gulf States are expected to become increasingly important markets for Indian IT-ITES firms, although the US is expected to continue as the main destination market for Indian IT-ITES exports.

The IT-ITES sector also accounts for a growing share of inward foreign investment flows. The supportive policy environment in terms of fiscal, trade, other incentives and targeted programs for the industry, and a liberal foreign investment regime have led to a steady increase in inward foreign investment in India's IT-ITES sector. Inward foreign investment grew from \$1.6 million in 2000 to \$7.7 million in 2006 with this sector consistently attracting the highest levels of private equity and venture capital investment in the country. Inward investments are taking place through alliances, partnerships, and mergers and acquisitions, and expansions by multinational players such as IBM, Microsoft, Sun Microsystems, SAP, and Oracle in the Indian market.

Increasingly, Indian IT and BPO companies are establishing branches and subsidiaries in overseas markets either by acquiring companies overseas or by increasing their foreign equity stakes. Major players such as Infosys, TCS, and Wipro, as well as medium-size players such as Sasken, Hinduja TMT, and Sonata Software have acquired companies or obtained a majority stake in companies based in the US, Europe, and Canada. These outward investments are being undertaken to improve their multi-country service delivery capabilities, to better manage changing client requirements, and to execute end-to-end delivery of new and emerging services. A combination of green field initiatives, cross-border mergers and acquisitions, partnerships and alliances with local players in client markets and near-shore, low-cost locations are being used by Indian companies when investing overseas.

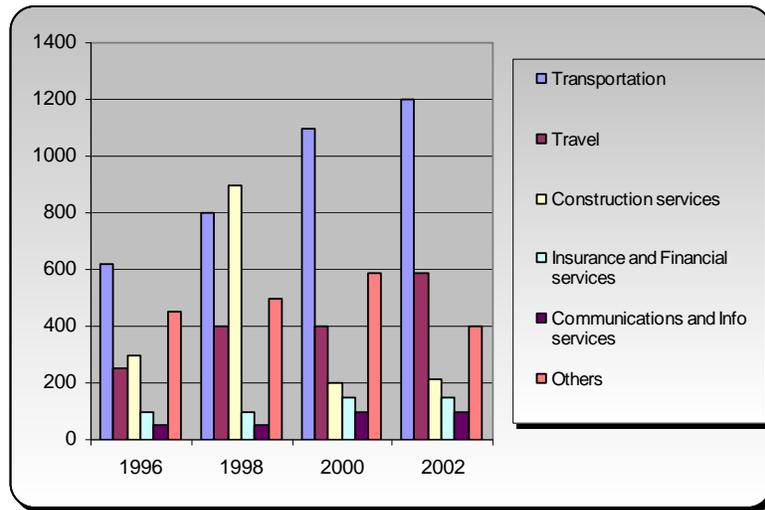
5.3 India-EU Bilateral Relations in IT-ITES

Recent data from WTO's International Trade Statistics indicate that the EU exported \$60.2 billion of computer and information services in 2005 and ranked highest in the

world. However, over 60% of this export was within the EU. The EU's computer and information services exports to India stood at a mere \$227 million in 2005, or only 1.06% of extra-EU exports in this sector. India was the second most important source of computer and information services imports for the EU. India's exports to the EU in this sector were around \$4 billion in 2005.

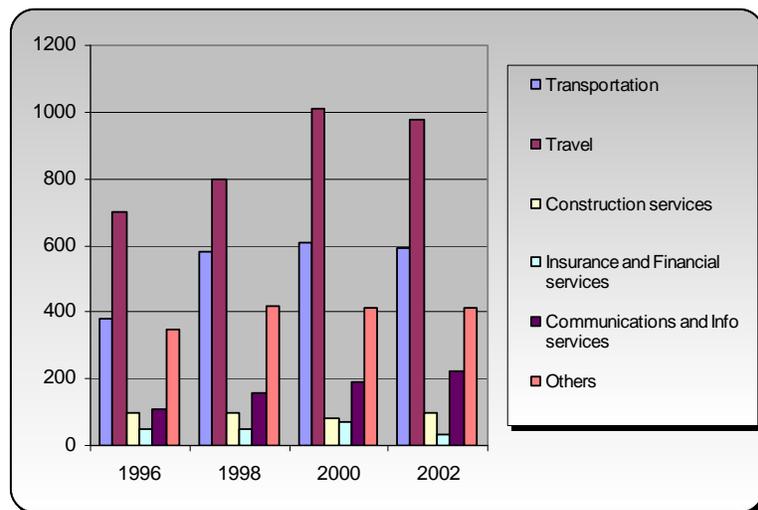
The following figures provide a break-up of the EU's trade with India by different service sectors. EU exports of communication and information services to India stood at €400 million in 2002, while its imports in this area from India were a little over €400 million.

Figure 10: EU's Services Exports to India by Main Sector



Source: Commission of European Communities (2004).

Figure 11: EU's Services Imports from India by Main Sector



Source: Commission of European Communities (2004).

However, within total software services imports into the EU, India is an important source country. It accounts for roughly 25 per cent of the EU's total imports of software services. Moreover, the growth rate in software services imports from India into the EU has been very high, second only to that of financial services. Hence, the EU is important as an export market for India in the IT-ITES sector and India is an important import source for the EU in the IT-ITES sector.

According to NASSCOM, in 2004-05, Europe (excluding Switzerland which is not an EU member country) accounted for a little less than 23% of India's IT-ITES exports at a value of \$4 billion, second to the US which accounted for 66.5% of India's IT-ITES exports or \$11.7 billion. The UK is the single most important country for India within the EU, constituting 14% or \$2 billion of India's exports in this sector, followed by Germany and the Netherlands, with shares of 2.3 and 1.4 per cent, respectively. Individually, the main EU countries apart from the UK are comparable to countries in other parts of the world as export markets. The table below shows the direction of India's IT-ITES exports and the importance of particular countries within the EU in trade in this sector.

Table 5: Indian Services (IT-ITES) Exports by Destination Country

(USD Million)	2002-03		2003-04		2004-05	
	Share (%)	Value	Share (%)	Value	Share (%)	Value
Americas	69.1	6,590	69.4	8,884	68.4	12,107
Brazil	0.01	1	0.01	1	NA	NA
Canada	1.1	101	1.1	143	0.9	159
Mexico	0.01	1	0.01	1	NA	NA
USA	67.7	6,464	68.2	8,725	66.5	11,769
Rest of America	0.2	24	0.1	13	1.0	178
Asia, Oceania & Middle-East	7.9	757	7.4	943	8.0	1,416
Australia	0.8	76	0.8	105	0.8	139
China	0.1	10	0.1	15	0.1	24
Hong Kong	0.2	19	0.2	26	NA	NA
Japan	2.8	269	3.0	385	2.8	500
Singapore	1.7	166	1.8	227	1.7	300
South Korea	0.2	16	0.2	23	0.0	7
Rest of Asia, Oceania & Middle-East	2.1	201	1.3	161	2.6	460
Europe	22.2	2,123	22.6	2,894	23.1	4,093
UK	14.0	1,336	14.5	1,857	14.0	2,478
Germany	2.6	248	2.8	354	2.3	400
France	0.5	46	0.5	65	0.4	72
Italy	0.1	9	0.1	12	NA	NA
Finland	0.4	40	0.5	61	NA	NA
Sweden	0.5	51	0.6	76	0.6	100
Netherlands	1.1	101	1.0	129	1.4	250
Switzerland	0.7	64	0.7	91	0.7	120
Rest of Europe	2.4	228	1.9	249	3.8	673
Others	0.8	74	0.6	81	0.5	90
GRAND TOTAL	100.0	9,544	100.0	12,800	100.0	17,705
^ Excludes hardware exports due to lack of granularity in data. Totals may not add-up due to rounding-up of individual figures.						

Source: NASSCOM.

5.4 Significance of modes in India-EU relations in IT-ITES

India's software services exports to the EU are delivered through on-site as well as offshore modes of delivery. On-site presence involves both cross-border movement of Indian software service providers to the EU market and establishment presence by Indian companies in the EU market through overseas investment. Offshore delivery to EU countries involves the provision of various outsourced services by Indian IT and BPO companies to EU client companies and by captive subsidiaries of EU multinationals. Thus, Modes 1, 3, and 4 of the GATS are all important modes of supply for Indian IT-ITES companies in the EU market.

Investment is an important means of accessing the EU market. Many Indian IT-ITES companies have set up operations in the EU, particularly in larger markets such as the UK and Germany (which are the two most important countries for Indian IT-ITES exports within the EU region). This investment has been organic and inorganic in nature. Table 6 summarizes the countries where key Indian IT-ITES providers have established a commercial presence in the EU region and the nature of their operations.

Table 6: Commercial presence in the EU by key Indian IT service providers

Company	EU share in total revenues	Selected countries with local presence	Nature of operations and selected clients
Infosys	22%	UK, Germany, Benelux, Czech Republic	<ul style="list-style-type: none"> • Airbus, Deutsche Bank, Tesco, and Johnson Controls • Software services, package application development, enterprise solutions, BPO, financial, network architecture, maintenance, and various advanced applications
Infotech	41%	UK, Germany, Netherlands	<ul style="list-style-type: none"> • Specialized business verticals of utilities and transportation-services for power, gas, transportation, telecom, and local government, engineering, manufacturing industrial and commercial products
TCS	22%	UK, Germany, France, Italy, Spain, Belgium, Netherlands, Sweden, Norway, Finland, and Hungary	<ul style="list-style-type: none"> • Alliances with leading technology companies, collaboration and strategic partnerships with institutions in the EU • Offshore development centre for leading European companies • IT, business consulting, engineering and industrial services, product- and asset-based solutions • Banking and telecom clients

Company	EU share in total revenues	Selected countries with local presence	Nature of operations and selected clients
Wipro	30%	UK, Ireland, France, Germany, Belgium	<ul style="list-style-type: none"> • R&D services, IT solutions and services, including systems integration, information systems outsourcing, package implementation, software application development and maintenance services • Clients in retail, consumer products and distribution, health and life sciences, energy and utilities, financial services, manufacturing, telecom, and technology products.
MindTree	22%	UK, Nordic region, Netherlands, Germany, France, and Belgium	<ul style="list-style-type: none"> • IT services, R&D services • Clients in travel and leisure, manufacturing, financial services • R&D services are provided to industries such as communications, computing systems, storage systems, consumer appliance, industrial systems, and semiconductor.

Table 7 shows recent acquisitions by some well-known Indian companies in the EU. Acquisitions have become an important mode for Indian companies to establish an overseas commercial presence in the EU in this sector.

Table 7: Key Indian Acquisitions in the IT-ITES sector in the EU

Acquirer	Target Company	Country targeted	Deal value (€ million)
Subex Systems	Azure Solutions	UK	110
Wipro	Newlogic Technologies	Austria	44.3
HCL Tech BPO Service	BT's Apollo Contact Centre	Belfast, Northern Ireland	Not available
TCS	Pearl Group	UK	53.5
Sasken Communication Technologies	Botnia High-Tech O	Finland	35.5
Satyam	Citisoft	UK	Not available

Source: IBEF (2007).

Overall, three modes of supply are pertinent to India-EU bilateral relations in the IT-ITES sector. These are: Mode 1 or cross-border supply given the significance of outsourcing activities by EU client companies; Mode 3 given the significance of overseas investment, strategic acquisitions, and establishment of sales and marketing offices by Indian companies and the presence of EU multinationals in India; and

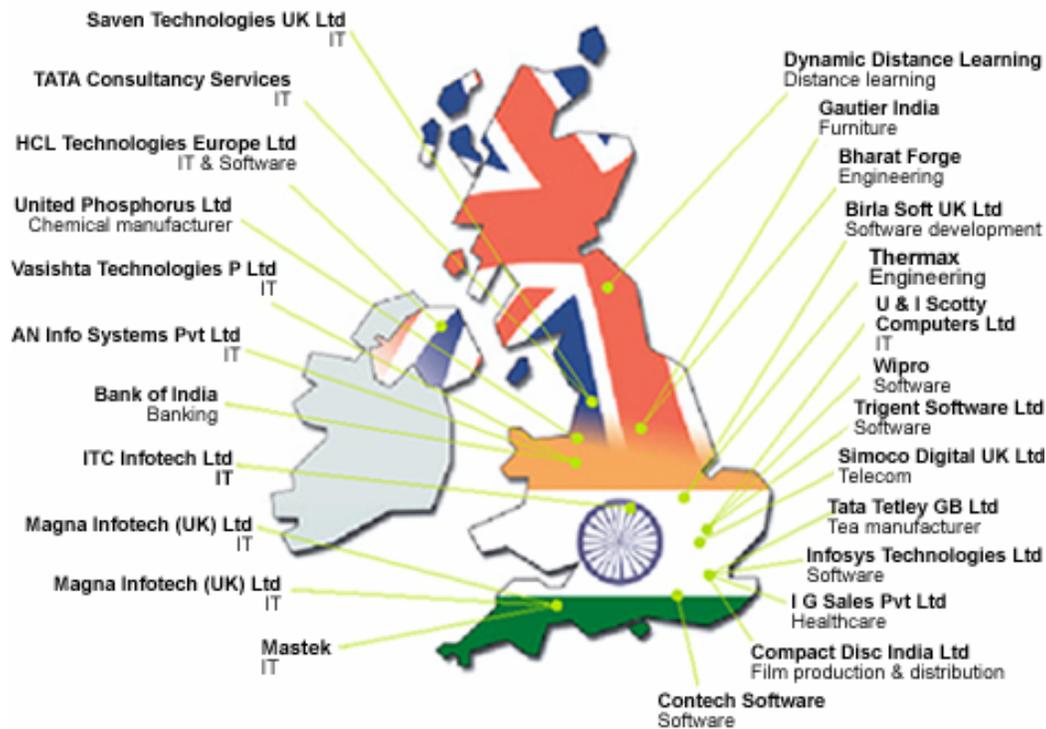
Mode 4 given the use of Indian software personnel and global resources by Indian companies in their EU offices. Thus, Modes 1, 3, and 4 are critical for advancing India's export interests in this sector in the context of the India-EU TIA.

5.5 Significance of the UK for Indian IT-ITES companies

It is important to separately discuss the importance of the UK as a strategic market for the Indian IT-ITES industry, both in terms of its size and scope and in terms of its significance as an entry point and hub for the companies' European operations. The UK contact center services market is estimated at around \$3.5 billion. It is also a large market for IT and IT-enabled services. Investment presence in the UK is a common strategy for all Indian IT-ITES companies, through organic and inorganic means. Indian IT-ITES companies note that they are attracted to the UK's pro-business, low tax environment, its position as Europe's largest e-commerce market, its well-developed infrastructure and R&D facilities, the English language resource base, and the country's strategic presence as a gateway to the EU market.

The following figure provides a sample of Indian investors in the UK across various industries. The sample clearly shows that the bulk of these companies are in the IT-ITES sector. The companies include those discussed earlier as well as others such as HCL Technologies, Vasishta Technologies Pvt. Ltd., ITC Infotech Ltd., Magna Infotech (UK) Ltd., Mastek, Satyam Technologies UK Ltd., AN Info Systems Pvt. Ltd., Birla Soft UK Ltd., Trigent Software Ltd., and Contech Software.

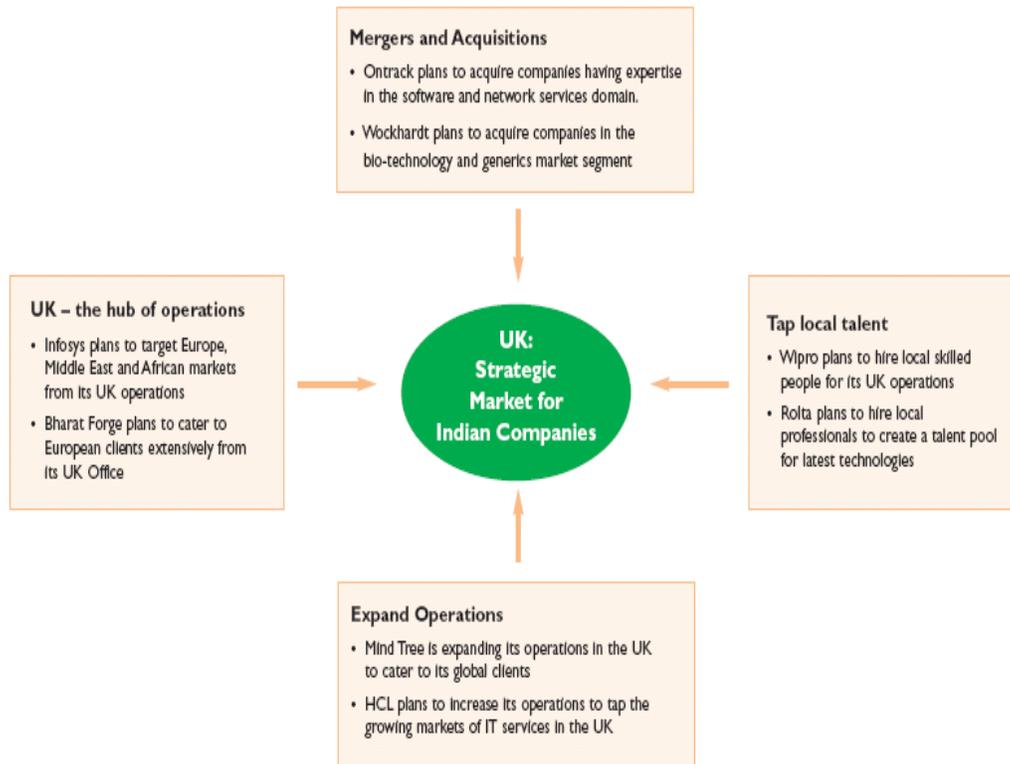
Figure 12: Sample of Indian Investors with the UK



Source: Reproduced from the British High Commission website.

The following chart highlights the future plans of Indian companies, including major IT-ITES companies, in the UK and the factors motivating their presence in the UK.

Figure 13: Future Plans of Indian Companies in the UK



Source: IBEF (2007), Going Global: India Inc. in UK.

The significance of the UK market is also evident from the fact that NASSCOM opened its first overseas chapter in the UK and has signed MOUs with its British counterpart trade association, Intellect, and the Welsh Development Agency. In association with the Financial Times, NASSCOM also holds a prestigious annual conference in London on Outsourcing to India. UK companies have become an increasingly important source for outsourcing business for Indian firms and information services constitute one of the main services traded between India and the UK.

The case of HCL Technologies in the UK illustrates the interests of Indian IT-ITES providers in that market. The UK's share in HCL revenues has grown from 6-7% in 2000 to 25% more recently. At present, the company operates through three offices and two delivery centers in the UK. It provides application development, infrastructure management, and business process outsourcing services in the UK.

The UK is a major base for HCL Technologies for its business process outsourcing business. HCL entered the UK in 2001 with a strategic alliance with British Telecom (BT) to offer BPO services through BT's 400-seat Apollo Contact Centre at Belfast. It acquired a 90% equity stake in Apollo Contact Centre while BT held the remainder. In 2004-05, this joint venture was closed with the acquisition of the remaining 10%

stake by HCL. The Belfast center recorded revenue growth of 200% during 2001-05. The company is the largest Indian employer in Northern Ireland, providing employment to over 2,500 persons. HCL-UK focuses on five industry verticals, namely, banking and financial services, life sciences, retail, telecom, and high-technology. HCL provides support services to European clients through its office located in Ireland, making use of local skills. Lower-end functions are transferred to its sister operations in India while higher-end functions are provided through the center in Ireland. HCL plans to target public sector projects for future growth in the UK market and is also targeting emerging segments such as media, publishing, and utilities.

5.6 EU Companies in India

European companies are increasingly recognizing the importance of the Indian market as an offshore destination and for leveraging skilled manpower. Several major European MNCs have captive subsidiaries, research and development centers, and BPO centers in India. Several have entered into major deals with Indian IT-ITES companies and are leveraging Indian manpower to provide consulting services. Some of these firms include Siemens, Deutsche Bank, ABN-Amro, Daimler Chrysler, Philips, SAP, and Bosch.

Deutsche Bank has started BPO operations in India with the launch of Deutsche Network Services Pvt. Ltd in Bangalore for payment and cash management services. Robert Bosch India Limited is a wholly-owned subsidiary of Robert Bosch GmbH and is the software division of Bosch in India with development centers in Bangalore and Coimbatore. The company develops software and engineering solutions for all business sectors within the Bosch Group across Europe, the US, Asia, and Australia and is the largest Bosch development center outside Germany, with over 4,000 associated employees.

Overall, three modes of supply are pertinent to India-EU bilateral relations in the IT-ITES sector. These are Mode 1 or cross-border supply given the significance of outsourcing activities by EU client companies; Mode 3 given the significance of overseas investment, strategic acquisitions, and establishment of sales and marketing offices by Indian companies and presence of EU multinationals in India; and Mode 4 given the use of Indian software personnel and global resources by Indian companies in their EU offices. Thus, Modes 1, 3, and 4 are critical for advancing India's export interests in this sector in the context of the India-EU TIA.

6. Trade and Investment Barriers affecting India-EU Relations in IT-ITES

The following discussion is divided into two parts: the first part deals with barriers in the EU due to regulations in EU Member States or at the EU-wide level, while the second part deals with barriers associated with regulatory and institutional frameworks in India. The discussion is based on interviews with IT-ITES companies, both Indian and multinational, that operate in India, and corroborated with information from secondary sources.

Interviews were conducted with 13 IT-ITES companies during May-September 2007 and in February 2008. They were held in person and over the phone with management

and senior staff in their Bangalore, National Capital Region (Delhi, Gurgaon, Noida), and Mumbai offices. The aim was to understand the operations undertaken by small, medium, and large Indian IT-ITES companies as well as multinational IT-ITES companies for the EU market and the key barriers that affect business with the EU. In addition, views were solicited from industry association representatives, economic counselors of the German and French embassies in New Delhi and experts at the British High Commission and the European Commission. The interviews with other stakeholders aimed to validate the views of the companies and to get alternate perspectives and information.

A total of 31 interviews were conducted. The companies/institutions that were interviewed and the number of persons interviewed are listed below.

- Cognizant Technology Solutions (1)
- HP (2)
- IBM India (2)
- iFlex Solutions (2)
- Infosys (4)
- Infosys-Progeon (1)
- MindTree IT and Consulting Services (4)
- Sasken (1)
- Sonata Software (1)
- Tata Consultancy Services (3)
- Vertex India Ltd.(1)
- Wipro (2)
- Xansa Technologies (1)
- NASSCOM (1)
- European Commission (1)
- British High Commission (2)
- French Embassy in India (1)
- German Embassy in India (1)

The discussions indicated the nature and extent of operations by both well-known as well as small and medium-size Indian IT-ITES companies that are engaged in operations in the EU market or in offshore contracts for EU clients. The range of services was as highlighted in the preceding section, with segments such as banking and financial services, telecom, network architecture, and enterprise solutions emerging as some of the main services rendered to EU clients. The UK is clearly the main destination market within the EU. The discussions revealed the significance of investments in the EU through the establishment of branches or subsidiaries as the main mode of market penetration and to facilitate the deployment of service providers in the EU market. The outsourcing business remains largely limited to UK-based companies though considerable scope is seen for expanding outsourcing activities in other EU countries.

6.1 Barriers in the EU

Five issues or barriers emerged as the key factors affecting IT-ITES exports from India to the EU. These were: (1) immigration policies; (2) data protection regulations;

(3) investment policies; (4) tax policies; and (5) labor laws and regulations in EU countries. As is evident from this list of barriers, there are border issues in the form of regulations related to labor and capital mobility; there are also behind-the-border issues in the form of labor market, tax, and data protection regulations in the EU market. Hence, there are market entry as well as national treatment and domestic regulatory issues which affect Indian IT-ITES exporters in the EU region. Each of these five barriers and their associated issues is highlighted in separate summary tables below (in order of importance), drawing upon the primary and secondary evidence. For additional information on specific sections, refer to Appendix B.

(1) Immigration policies

The single biggest problem identified in the discussions with management and staff of IT-ITES companies is immigration policies in EU countries. This is a critical issue as Indian companies deploy resources from India and even centers outside India to provide on-site services in EU countries and also send persons for business visits, prospecting, and sales and marketing functions to the EU region. The main problem is getting people on site, particularly when the client needs support services quickly. Moreover, deployment needs vary across the life-time of a project, with the initial onsite-offshore mix being as high as 50-50 and on-site presence falling over time. Often, companies need to send specific resources, in terms of language or domain expertise, on short notice of a few days to a particular client market. All companies interviewed noted that predictable and quick timelines and clarity on processes and requirements are essential for their business and that most EU countries pose difficulties in all these respects. The following table summarizes the range of problems, their key features, and implications.

Table 8: Constraints in the EU related to Immigration Policy

Problem	Features and Implications
Long timelines and cumbersome processes and procedural requirements	<ul style="list-style-type: none"> • Visas can take from 1 week to 3-4 weeks in a country • Variability in visa processing time across countries ranging from 1-2 weeks to 6 months • Processing time often significant share of total stay period • Business visas may take over a week to process, no fast tracking • Legal representative required to physically submit each work permit application • Disparity between stated lead time and actual processing time • Tedious legalization and attestation requirements
Restrictive conditions on entry, length of stay, extensions,	<ul style="list-style-type: none"> • No long-term multiple-entry business visas in some countries, variable conditions • Labor market tests, minimum wages, investment requirements attached to entry

Problem	Features and Implications
renewals, dependents	<ul style="list-style-type: none"> • Family, dependents may not be allowed to enter • Entry conditions limit flexibility in deploying resources from India or other countries, restricted to 3-6 months from the date of entry • Residence permit requirements following entry, but issuance takes long (1-3 years) • Duration of residence permit varies across countries • Requirement that first entry point and maximum stay in EU country where business visa issued • No flexibility for repeat applications
No internal market for labor mobility for non-EU nationals	<ul style="list-style-type: none"> • Need to apply to each EU member country separately for work permits • Lack of harmonization in terms and conditions, procedural requirements • Different views among member countries on labor market policies
Lack of appropriate visa categories and classifications of service providers	<ul style="list-style-type: none"> • Lack of visa categories and service provider classifications pertinent to frequent, short duration, multiple-entry travel • Lack of recognition of categories between work permit and business visitor, involving domain knowledge and specialized expertise
Non-transparency, discretionary approval	<ul style="list-style-type: none"> • Sudden changes in immigration policies without prior notice • Lack of clarity on use of different classes of visas

(2) *Data protection barriers*

The second important barrier identified was data protection. All companies interviewed stressed the importance of data protection as a determinant of India-EU trade in BPO services (not IT). The EU has stringent data protection requirements. Its data privacy law is based on extraterritoriality and is handled at a business-to-business level. The EU has elaborate data masking algorithms that are required of offshore companies and has protocols on data transfer. There is an EU-wide data protection directive but, in addition, each country is governed by its own laws in this area. The emphasis of the EU laws is on data storage and transmission. Segments such as financial and contact center services which see and use live data are most affected by such regulations in terms of the extent and type of information that can be offshored and thus the kinds of contracts that can be signed. The following table summarizes the main problems this raises for Indian companies.

Table 9: Constraints in the EU Related to Data Protection

Problem	Features and Implications
India not empanelled by the EU for data transfer	<ul style="list-style-type: none"> • Prevents jobs involving data on EU citizens from being outsourced to India • Difficulties in outsourcing financial and contact centre services where live data used • Strict contractual obligations on Indian companies for data protection, IP clauses • Liability of Indian companies, arbitration in EU courts • Need to establish offshore development centers in EU countries which are recognized for data transfer • Compliance and audit costs for Indian companies

(3) Investment regulations

The third barrier identified by companies is related to investment issues. Overseas investment is a significant market entry strategy for Indian IT-ITES companies; further, movement of natural persons is intimately connected with commercial presence. Thus, Indian companies need to set up branches or subsidiaries in order to apply for a work permit for personnel they move from India or their other global delivery centers to EU countries. While ideally Indian companies would like Mode 4 to be delinked from Mode 3, they recognize that this may not be feasible. Most respondents noted that they accept the need to set up a local commercial presence in order to get work permit authorizations for on-site services and would like to use Mode 3 more effectively to expand their presence in the EU, acquire new lines of service and customers, leverage the local skill sets, and create value in the local economy. The following table summarizes the main problems associated with investment in the EU.

Table 10: Constraints in the EU Related to Investment

Problem	Features and Implications
Investment procedures and timelines	<ul style="list-style-type: none"> • Time taken to establish commercial presence varies across EU member countries (2 weeks to several months) • Requirements vary across countries • Cumbersome legalization, attestation, audit requirements • No distinction made between high- and low-value investments • No tracking mechanism • Sub-jurisdictional requirements within member countries • Processing delays lead to delays in deploying service providers • Employment conditions

Problem	Features and Implications
Treatment of subsidiaries versus branch treatment	<ul style="list-style-type: none"> • Differences in ease of establishment, registration, legalization requirements • Easier to set up subsidiaries compared to branches but may not be suited to company's delivery model, additional costs due to audit and reporting requirements
Business environment	<ul style="list-style-type: none"> • Varies across countries due to differences in ease of setting up, closing, enforcing contracts, employment conditions, investor protection

(4) *Taxation issues*

Another issue raised by Indian companies was taxation, **not as a barrier per se** to doing business in the EU but as a factor that raises the costs of doing business in the EU. Several companies voiced concerns about the nature and extent of tax liabilities faced in EU countries. These include tax liabilities arising from employee taxation, corporate taxation, and social security taxes. The following table summarizes the problems associated with taxes in the EU.

Table 11: Concerns Related to Taxation in the EU

Problem	Features and Implications
Social Security Taxes	<ul style="list-style-type: none"> • Paid by Indian service providers on short-term contracts, but not able to avail of contributions • Exemption not possible due to lack of equivalent social security system in India • Double burden on companies as they pay part of these contributions plus insurance cover
High tax incidence	<ul style="list-style-type: none"> • High tax rates: employee, corporate (as high as 50% of total tax burden) • Related audit and accounting requirements, varying across countries • Investment-related tax benefits not generous, not oriented towards people-intensive activities
Tax related procedures	<ul style="list-style-type: none"> • Stringent auditing and accounting requirements, not suited to delivery model and cost structure of IT companies • Fringe benefit taxes create disincentives • Lack of harmonization in practices, tax regimes, financial years, and eligibility requirements for exemptions across member countries
Treatment of offshore income	<ul style="list-style-type: none"> • Uncertainty about future taxation of offshore earnings • Lack of clarity about attribution of revenue and expense and associated administrative complexities due to business model in IT

(5) *Labour market regulations*

Another problem identified was labor market regulations in the EU, **not as a barrier per se** but as something that made it more difficult and expensive for companies to do business in the EU. Several companies highlighted difficulties they face with rigid labor market regulations on hiring, firing, local employment, wages, working hours, and unemployment compensation in EU countries. They also discussed difficulties arising from divergent views across member countries on labor market regulations and thus the problems created in doing business across multiple countries in the EU market. The following table summarizes the main problems.

Table 12: Constraints related to Labor Market Regulations in the EU

Problem	Features and Implications
Local employment conditions	<ul style="list-style-type: none">• Imposes additional costs on companies, affecting scalability of operations
Labor market tests	<ul style="list-style-type: none">• Not justified in areas of known shortages or specialized expertise which is not available in host market• Create delays in deploying people, imposes additional costs in terms of search and time requirements
Rigid labour laws	<ul style="list-style-type: none">• Firing and downsizing costs• Unionization• Overtime compensation requirements• Conditions on maximum number of hours, leave requirements
Other issues	<ul style="list-style-type: none">• Cultural, social, linguistic differences

Summary of the primary findings

The following table summarizes the views of the various companies interviewed on the main factors affecting trade in IT-ITES between India and the EU. It indicates that there is some variability in views across companies, depending on the kind of company and the model of operation. Overall, in order of importance of perceived barriers, **labor mobility and data protection are the two most important.**

The summary shows that cultural and linguistic barriers and data protection regulations laws are viewed as severe or moderate barriers to doing business with the EU, across all companies. Labor laws are also a common problem; the fact that most companies rate it as a moderate barrier reflects their acceptance of such regulations as the sovereign right of any country and thus not necessarily as barriers. There is a difference between Indian companies and multinational companies on immigration regulations; the former see immigration regulations as a severe barrier whereas multinationals do not face much problem. Likewise, tax and investment regulations are seen as major barriers where companies depend heavily on movement of workers between India and the EU location and where companies tend to work through the branch as opposed to the subsidiary model. Multinational companies do not face problems in the investment area.

Table 13: Summary of company views on factors affecting India-EU IT-ITES trade

Severe -1						
Moderate-2						
No problems-3						
Companies	Entry/ Visa	Investment	Data protection	Taxes and Benefits	Cultural Issues	Labor Laws
Large companies						
Infosys	1	2	1	1	1	2
TCS	1	2	2	2	1	2
Wipro	2	2	2	2	1	2
Cognizant	1	2	1	2	2	2
Infosys BPO	2	2	1	1	2	3
Small and medium companies						
MindTree	1	2	1	1	2	2
Sasken	2	1	1	1	1	2
Sonata Software	1	2	1	1	1	2
Xansa	1	2	2	2	1	2
Vertex India	2	2	2	2	2	2
iflex	1	2	2	2	2	2
Multinationals						
HP	2	3	2	3	2	2
IBM	2	3	2	3	2	2

Source: Based on interviews with management of IT-ITES firms.

Across the five broad areas of concern, an important issue in the India-EU TIA negotiations will be the lack of a single market within the EU in areas that matter to the IT industry, namely, immigration laws, tax regimes, investment policies, labor laws, and establishment of common benchmarks or norms. On data protection, the issue is the stringency of the data protection clauses in the EU directive and the need for greater awareness among EU authorities of the state of data security protocols and systems in the Indian BPO industry; although data protection regulations mainly affect BPO companies, IT companies found them a major barrier to doing business with the EU. Indian companies are aware of the difficulties in seeking greater harmonization in these areas and are generally skeptical of the outcome of the India-EU TIA negotiations on these issues given the realities of the EU mandate and the political and social sensitivities in individual EU member countries.

6.2 Barriers in India

Indian IT and BPO firms noted inadequacies in Indian legislation and procedures which act as impediments to expanding business with the EU in this sector. The two issues that emerged are discussed below in their order of importance.

6.2.1 Documentation and certification processes

Several IT companies pointed out that the documentation and certification process within India is very long, which delays the visa or work permit application process and deployment of workers to EU countries. Often, required documents such as birth or educational certificates are not readily available and individual applicants face problems in getting the documents. Once these documents are obtained, they have to be legalized as overseas authorities want to ensure that all documents are valid. They require all documents to be attested by the concerned government agencies by providing a seal on the documents. This is done by the state secretary, who is designated by the Ministry of Home Affairs for this purpose. The timeline for this process varies across states, from as low as 2 days in some cities to over a month in others. The lack of an internal tracking or identification system/ number for Indian nationals forces multiple levels of checks and clearances by various authorities. (There are also local issues; often persons are not willing to part with important documents for attestation in case they are lost or misplaced). Once attested, the sealed documents are sent to the Home Ministry and the names of the concerned persons are shared with the EU embassies and consuls. This entire legalization process on the Indian side can take around 3 months followed by a few more days at the Home Ministry. (The verified documents can only then be sent to the respective consul or embassy, following which it may take another 1-2 days or as much as 4-6 weeks for the visa or work permit to be issued by the concerned embassy or consulate. Different EU countries have different verification procedures).

6.2.2 Data protection issues

While most companies stated that they have adequate data security standards and protocols in place and that amendments to the IT Act address the EU's concerns on breach of obligations and enforcement issues under Section 43-A, some companies expressed the need for enacting national data protection legislation to build India's image and facilitate outsourcing to Indian companies by the EU.⁹ A mapping of the EU directives on data protection and the provisions of the EU-US Safe Harbor Decision against the clauses in India's IT Act of 2000 as well as the 2005 amendment to this act indicate gaps which could pose concerns for EU Data Protection authorities.

⁹ Data protection in India has followed approaches in the APEC and the US. Corporate bodies are required to implement the best practices to protect the data. Under Section 43-A there is heavy compensation for affected users. Under breach and confidentiality provisions, intermediary and service providers are not supposed to disclose personal information of the subscriber or user acquired by them while providing services and there are penalties in the form of fines and imprisonment under Section 72A.

Table 14: Comparison of EU Directives on Data Protection with India’s IT Act 2000

Important		
GAPS		
Core Issue		
Category	EU: Directives	India: The Information Technology Act 2000
Data protection in the electronic communications sector (on privacy and electronic communications (2002/58/EC))	Confidentiality: The Directive reiterates the basic principle that Member States must, through national legislation, ensure the confidentiality of communications made over a public electronic communications network. They must in particular prohibit the listening into, tapping and storage of communications by persons other than users without the consent of the users concerned.	As per ITA 2000 clause 30. Certifying Authority to follow certain procedures. Every Certifying Authority shall: <ul style="list-style-type: none"> (a) make use of hardware, software and procedures that are secure from intrusion and misuse; (b) provide a reasonable level of reliability in its services which are reasonably suited to the performance of intended functions; (c) adhere to security procedures to ensure that the secrecy and privacy of the digital signatures are assured; and (d) observe such other standards as may be specified by regulations.
	Data retention: The Directive stipulates that Member States may withdraw the protection of data only to allow criminal investigations or to safeguard national security, defense and public security. Such action may be taken only where it constitutes a “necessary, appropriate and proportionate measure within a democratic society.”	Clause 16 specifies that the Central Government has the power to differentiate the quality of data. Not sure though if it is encompassing the view as defined in EU act

	EU: Directives	India: The Information Technology Act 2000
	<p>Unsolicited electronic messages (“spamming”): The Directive takes an “opt-in” approach to unsolicited commercial electronic communications, i.e., users must have given their prior consent before such messages are addressed to them. This opt-in system also covers SMS text messages and other electronic messages received on any fixed or mobile terminal.</p>	
	<p>Cookies: Cookies are hidden information exchanged between an Internet user and a web server, and are stored in a file on the user’s hard disk. Their original purpose was to retain information between sessions. They are also a useful and much decried tool for monitoring a net surfer's activity.</p> <p>The Directive stipulates that users should have the opportunity to refuse to have a cookie or similar device stored on their terminal equipment. To that end, users must also be provided with clear and precise information on the purposes and role of cookies</p>	
	<p>Public directories: European citizens will have to give prior consent for their telephone numbers (landline or mobile), e-mail addresses and postal addresses to appear in public directories.</p>	

Source: Based on Khare and Gandhi (September 2007)

SH Principles	Directives	India's Offering
Onward Transfer (Transfers to Third Parties)	To disclose information to a third party, organizations must apply the notice and choice principles. Where an organization wishes to transfer information to a third party that is acting as an agent (1), it may do so if it makes sure that the third party subscribes to the safe harbor principles or is subject to the Directive or another adequacy finding. As an alternative, the organization can enter into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant principles.	This can be the initiative of SRO
Access	Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individuals privacy in the case in question, or where the rights of persons other than the individual would be violated.	Though the definition of Data defined in ITA - 2000, no specific comment on access
Security	Organizations must take reasonable precautions to protect personal information from loss, misuse and unauthorized access, disclosure, alteration and destruction.	Section 43 A covers it + Article 66 and 67 also added for this '66. If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five lakh rupees or with both. Explanation.-For the purposes of this section,- (a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code; (b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code. 66A. Any person who sends, by means of a computer resource or a communication device,- (a) any content that is grossly offensive or has menacing character; or (b) any content which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently makes use of such computer resource or a communication device, shall be punishable with imprisonment for a term which may extend to two years and with fine.
Data integrity	Personal information must be relevant for the purposes for which it is to be used. An organization should take reasonable steps to ensure that data is reliable for its intended use accurate, complete, and current.	Section 43 A covers it

SH Principles	Directives	India's Offering
Notice	Organizations must notify individuals about the purposes for which they collect and use information about them. They must provide information about how individuals can contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information and the choices and means the organization offers for limiting its use and disclosure.	<p>Not in the present IT Act 200, but proposed in the Amendment in section 43A,</p> <p>'43A. Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected,</p> <p>Explanation.-For the purposes of this section,-</p> <p>(i) "body corporate" means any company and includes a firm, sole proprietorship or other association of individuals engaged in commercial or professional activities;</p> <p>(ii) "reasonable security practices and procedures" means security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in con professional bodies or associations as it may deem fit;</p> <p>(iii) "sensitive personal data or information" means such personal information as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.'</p>
Choice	Organizations must give individuals the opportunity to choose (opt out) whether their personal information will be disclosed to a third party or used for a purpose incompatible with the purpose for which it was originally collected or subsequently authorized by the individual. For sensitive information, affirmative or explicit (opt in) choice must be given if the information is to be disclosed to a third party or used for a purpose other than its original purpose or the purpose authorized subsequently by the individual.	This can be the initiative of SRO

The comparison with Indian legislation reveals gaps in the following areas.

a. Choice

Organizations must give individuals the opportunity to choose (opt out) whether their personal information can be disclosed to a third party or used for a purpose incompatible with the purpose for which it was originally collected or subsequently authorized by the individual. For sensitive information, affirmative or explicit (opt in) choice must be given if the information is to be disclosed to a third party or used for a purpose other than its original purpose or the purpose authorized subsequently by the individual.

b. Onward Transfer

To disclose information to a third party, organizations must apply the notice and choice principles. Where an organization wishes to transfer information to a third party that is acting as an agent, it may do so if it makes sure that the third party subscribes to the safe harbor principles or is subject to the Directive or another adequacy finding. As an alternative, the organization can enter into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant principles.

c. Access

Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

Indian legislation lacks, with regard to notice and choice, the first two clauses in the Safe Harbor Decision. This provision requires the individual to be informed and made aware of the fact that his personal information could be forwarded for use by a third party. Another missing element is that the individual must **give his consent before his personal data is transferred and this consent must be given explicitly by the use of an electronic contract or otherwise**. In addition, he must have the **right to choose which data he would prefer to conceal** and not allow anyone access to. The Indian Act also does not provide for a **Data Protection panel**, which would be the ultimate authority responsible for investigating and resolving complaints lodged by individuals regarding violations of data privacy laws or infringement of the Safe Harbor principles, as is provided for under the Safe Harbor Decision.

The 2005 Amendment to the Information Technology Act addresses one of the earlier gaps, i.e., the issue of electronic signature and its validity. Section 4 of this amendment includes a provision allowing digital signatures to be recognized as one type of electronic signature. This provision also enables the Central Government to exercise its authority over other forms of electronic signatures which may materialize with technological development, so that further amendments to the act would not be required. Section 4 of the Amendment to the IT Act of 2000 also maintains consistency with the UNCITRAL Model on Electronic Commerce with regard to the

legal recognition of electronic signature and, in particular, its reliability.¹⁰ The Amended Act has an addition – Section 10 for “Formulation and Validity of Electronic Contracts”. The bill creates guidelines for Information System Providers (ISPs) on issues such as the monitoring of subscriber traffic by keyword and the disclosure of dynamic IP addresses of clients by ISPs.

The amended legislation addresses some of the concerns regarding data protection and privacy with the following:

- (i) Proposal at Sec. 43(2) relates to handling of sensitive personal data or information with reasonable security practices and procedures thereto
- (ii) Gradation of severity of computer related offences under Section 66, committed dishonestly or fraudulently and punishment thereof
- (iii) Proposed additional Section 72 (2) for breach of confidentiality with intent to cause injury to a subscriber.

However, Section 43-A provisions still do not explicitly address the issues of forwarding, transfer, and choice and do not clearly define what constitutes sensitive information (see Section 4.3 in this paper on India’s data protection regulations).

The comparative analysis indicates that existing or proposed Indian legislation fails to address the issue of transfer and forwarding of sensitive data. Even the amendments do not specifically provide for the protection of sensitive personal information. As noted by a senior person in an offshoring advisory services organization, offshoring from the EU would have increased considerably if safe harbor provisions were in place in India. He cites the case of two banks that sent work to India. It took them 18 months to move parts of product development and support work to India, which could have been moved in 6 months if there had been a data protection law in the country. The lack of data protection legislation forces companies to invest in additional processes, such as data encryption, and masking components of the data or circumscribes the way in which offshore centers can access data, such as having to access them through 'dumb terminals' stripped of hard-disk drives and email access. National data protection legislation backed by enforcement provisions and the kinds of initiatives being undertaken by NASSCOM would reduce the need for outsourcing companies to rely on contractual obligations, with uncertainties over arbitration and dispute settlement procedures.

7. EU’s Multilateral and Regional Commitments Relating to IT-ITES

The two preceding sections highlighted the barriers faced by Indian IT-ITES providers in the EU market and issues that they would like addressed in the India-EU TIA negotiations. Before examining strategies and measures to address these barriers, it is important to assess the extent to which the EU has committed in the computer and related services sector in the multilateral forum and in its other preferential trade or

¹⁰ The UNCITRAL Model on Electronic Commerce as adopted in 1998 is intended to facilitate the use of modern means of communications and storage of information. It is based on the establishment of a functional equivalent in electronic media for paper-based concepts such as “writing”, “signature” and “original”. By providing standards by which the legal value of electronic messages can be assessed, the Model Law should play a significant role in enhancing the use of paperless communication. The Model Law also contains rules for electronic commerce in specific areas, such as carriage of goods.

economic cooperation agreements (PTAs/ ECAs). The EU's willingness to negotiate in this sector and on regulatory issues affecting this sector in its multilateral and bilateral talks could indicate what India can expect from talks with the EU. It is unlikely that the EU would offer anything substantially more to India than what it has already committed to other countries or in the WTO.

7.1 Multilateral commitments and offers by the EU

The following tables examine the evolution of the EC's commitments and offers across all the modes.

7.1.1 Comparing the commitments and offers

Table 20 shows the number of EC member countries (EC-12) with Uruguay Round commitments in computer and related services, classified by the nature of these commitments in each mode and each sub-sector.

Table 15: EC-27 Uruguay Round commitments in Computer and Related Services (EC-12 + later members)

		Consultancy services	Software implementation services	Data processing services	Database services	Maintenance and repair	Other computer related services
Total		27	27	27	27	27	27
<i>Market Access</i>							
Mode 1	Full	26	26	25	26	24	24
	Partial	0	0	1	0	0	0
	Unbound	1	1	1	1	3	3
Mode 2	Full	26	26	25	26	24	24
	Partial	0	0	1	0	0	0
	Unbound	1	1	1	1	3	3
Mode 3	Full	26	26	25	26	24	24
	Partial	0	0	1	0	0	0
	Unbound	1	1	1	1	3	3
<i>National Treatment</i>							
Mode 1	Full	26	26	26	26	24	24
	Partial	0	0	0	0	0	0
	Unbound	1	1	1	1	3	3
Mode 2	Full	26	26	26	26	24	24
	Partial	0	0	0	0	0	0
	Unbound	1	1	1	1	3	3
Mode 3	Full	26	26	26	26	24	24
	Partial	0	0	0	0	0	0
	Unbound	1	1	1	1	3	3

Source: Author's compilation based on EC-12 and other member countries' commitments.

The above table shows that the commitments made by the original EC-12 and other later member countries were largely liberal in this sector across Modes 1, 2, and 3 but unbound in the case of Mode 4. It confirms the key issue flagged by the respondents that regulations concerning the movement of natural persons are their main concern in the EU market. There are 1 to 3 countries that left their commitments unbound or partial, with limitations mainly in the form of requiring licenses or on specific kinds of transactions such as on-line information and data processing. However, these are the smaller countries which have subsequently acceded to the EU. None of the original member countries or larger countries which are of interest to India's IT-ITES sector had inscribed any limitations in the original UR commitments in Modes 1, 2, and 3.

In the revised offer, all countries (original and newly acceded) made full commitments in Modes 1, 2, and 3. The table above would read 27 full and no partial or unbound entries for these three modes. There is an additional sub-sector, i.e., maintenance and repair services, which has since been removed from the sectoral classification under the offers. (See Appendix A on the scope of computer services under the GATS).

7.1.2 Comparing commitments and offers in Mode 4

There have been some improvements in the EC's sectoral and horizontal offers in Mode 4. The table below summarizes these changes from the Uruguay Round to the initial and revised offers.

Table 16: EC Commitments and Changes in Mode 4 Sectoral and Horizontal Offers in Computer and Related Services

Mode 4 Sectoral Commitments and Subsequent Changes in Offers	Horizontal Commitments (Uruguay Round)	Changes in Horizontal Commitments (Conditional Initial Offer 2004)	Changes in Horizontal Commitments (Conditional Revised Offer 2005)
<p>UR Unbound except for the commitments specified in the horizontal section.</p> <p>Initial Offer Unbound except as indicated in the horizontal section. This applies to ICTs, BVs and CSS.</p> <p>Revised Offer The only change from the earlier initial offer is the extension of the coverage to include</p>	<p>Unbound except for measures concerning entry and temporary stay, without requiring compliance with an Economics Need Test (ENT), for specified types of service providers under the categories of ICTs, BVs, and CSS.</p> <p>Specified service providers are:</p>	<p>Scope expanded to include graduate trainees.</p> <p>Other categories more clearly specified, conditions for market access granted, and some relaxation of conditions.</p> <p>ICTs: The natural person must belong to one of the following categories –Managers, Specialists and Graduate Trainees BVs: Entry and</p>	<p>The following additions were made:</p> <p>ICTs: For graduate trainees, the recipient company in the EC may be required to submit for prior approval a training program covering the duration of the stay demonstrating that the purpose</p>

Mode 4 Sectoral Commitments and Subsequent Changes in Offers	Horizontal Commitments (Uruguay Round)	Changes in Horizontal Commitments (Conditional Initial Offer 2004)	Changes in Horizontal Commitments (Conditional Revised Offer 2005)
<p>Independent Professionals (IP).</p> <p>A few countries have made the entry of CSS in this sector subject to an Economics Need Test (ENT).</p>	<p>ICT: managers and specialists BVs: those not engaged in direct sales and supply of services CSS: service supplier who is employee of a juridical person and employed for at least a year preceding such movement.</p> <p>Finland: exception requiring ENT</p>	<p>temporary stay permitted without an application of ENT for a period of up to 90 days in any twelve months (Applies to Finland too). CSS: Two categories – Employees of Juridical Persons (EJP) and Independent Professionals (IP) with specifications for qualifications, duration of stay, and nature of service delivered.</p>	<p>of stay is for training.</p> <p>No other significant changes.</p>

Source: Author's compilation based on EC UR commitments, Conditional Initial Offer and Revised Offers

Note: ICT= Intra Corporate Transferee, BV=Business Visitor, CSS=Contractual Service Suppliers, IP=Independent Professional. Among the countries covered, commitments on CSS for the Czech Republic, Hungary and Poland will come into force with effect from January 1, 2011.

The table above shows that although the sectoral offer remains unbound for Mode 4, there is an extension in the scope of the initial and revised offers in this mode to include the specific categories of CSS and IP under this sector.

The key improvement in the horizontal offer on Mode 4 is the removal of the economic needs test requirement, (which has since been reintroduced by a few countries). The other improvement is the clarification of individual categories such as CSS and associated eligibility criteria. The conditional initial and subsequent offers include an annex on **understanding the scope of coverage of the computer and related services sector** (see Appendix A, which the EU has endorsed plurilaterally in the GATS negotiations along with India). Thus, there is an attempt to improve transparency and clarity in the scope and coverage of the sector as well as the commitments.

But, overall, if one assesses the extent of market access granted, the EC has not granted anything substantively different in its Mode 4 commitments and offers. The EC has only indicated willingness to delineate different categories of service providers but access remains conditional on specified functional, qualification, and other criteria and subject to member country rules and regulations, which are highly disparate within the EU.

It was useful to study the EC's sectoral offers in Mode 4 for different categories of service providers, to see whether the EC has made distinctions among them and, if so, whether this was done uniformly across all sub-sectors. An analysis of the Uruguay Round commitments in Mode 4 made by the current EC-27 countries (EC-12 plus the countries acceding since the UR) as well as the revised offers in Mode 4 for the service provider categories pertinent to this sector, namely, ICT, BV, CSS, and independent professionals reveals that there is no change in stand. All entries remain unbound regardless of category and most entries refer to the horizontal commitments or offers pertinent to that category.

This table below examines whether the EC has shown greater willingness to provide favorable market access and national treatment conditions to certain categories of service providers over others. Although all sectoral commitments in Mode 4 are unbound, in order to distinguish between types of unbound entries all entries here which say "unbound" but refer to the horizontal section have been treated as partial, since the horizontal entries are by and large pertinent to the computer and related services sector.

Table 17: Latest EC Offer in Mode 4 in Computer and Related Services by Provider Category

Market Access	ICT			BV			CSS		
	Full	Partial	Unbound	Full	Partial	Unbound	Full	Partial	Unbound
Consultancy services	0	26	1	0	26	1	0	26	1
Software implementation services	0	26	1	0	26	1	0	7	20
Data processing services	0	26	1	0	26	1	0	7	20
Database services	0	26	1	0	26	1	0	7	20
Maintenance and repair	0	23	4	0	23	4	0	1	26
Other computer related services	0	23	4	0	23	4	0	1	26
National Treatment	N	P	U	N	P	U	N	P	U
Consultancy services	3	23	1	3	23	1	1	16	10
Software implementation services	4	22	1	4	22	1	1	16	10
Data processing services	3	23	1	3	23	1	1	16	10
Database services	3	23	1	3	23	1	1	16	10
Maintenance and repair	2	21	4	2	21	4	1	24	2
Other computer related services	2	21	4				1	24	2

Source: Author's compilation based on EC Latest Offer (2007).

Note: A partial sectoral commitment here refers to the entry, "Unbound except as indicated in the horizontal section" and not partial in the strict GATS sense of a sectoral commitment subject to limitations.

A few patterns emerge from the above table. It is clear that the EC has been unwilling to provide full market access to service providers under all three categories. But across all the sub-sectors within the computer and related services sector, the EC is relatively more liberal with regard to business visitors and intra-corporate transferees compared to contractual service suppliers, with the former two categories having more partial entries and the latter having more unbound entries. The table reveals that the EC's Mode 4 commitments have been more liberal for activities that involve proprietary and specialized knowledge, such as consulting services with more partial entries for even the CSS category compared to data processing or database services, where the entries for CSS are mostly unbound. In the case of repair and maintenance and non-specified, other computer related services, the number of unbound entries is higher, and more so for the CSS category.

Thus, not only is there a tilt in the EC's UR commitments towards higher functional categories but also towards higher value-added services within the sector. This pattern is significant given the comments by Indian IT industry persons regarding the need to make a finer classification system for service providers within the industry and to separate those providing IP-related services from those delivering purely on-site services. Some grading is implicit in the nature of these commitments. The issue is how to make this grading explicit through the commitments and visa/work permit regulations.

The revised EC offers include an additional category of service providers called independent professionals. However, the offers in Mode 4 remain unbound except as indicated in the horizontal entries; there is no sub-sectoral breakdown of the sector against these offers. Thus, apart from the expanded coverage of service provider categories, there is no basic change in the nature of the offers in Mode 4.

7.1.3 Assessing the horizontal offer in Mode 3

The EU's latest horizontal offer in Mode 3 was examined in light of the fact that Indian IT-ITES companies have a growing interest in overseas investment presence in the EU market and that movement of service providers is linked to the establishment of commercial presence in EU countries. While the sectoral commitments in Mode 3 are largely liberal, it is necessary to look at the cross-cutting nature of investment regulations as inscribed in the EU's horizontal schedule.

In the horizontal offer on investment, 10 countries have made full market access horizontal offers in Mode 3, while 15 have made partial offers and 2 have left this entry unbound. Under national treatment, 22 countries have given full offers, 3 have given partial offers, and 2 have left the offer unbound. However, almost all the EU countries of interest in the IT-ITES sector, barring France, Spain, Italy, Finland, and Hungary, have made unrestricted offers. Thus, there are no obvious investment-related barriers. The conditions mostly pertain to government approval requirements in sectors other than the computer and related services sector, and which subject the acquisition of shares to government approval where foreigners acquire more than the prescribed share of voting rights. Thus, there is nothing in the schedules of offers or commitments that suggest market entry and post-entry restrictions for IT-ITES providers from India. If one compares this analysis with respondents' views about the problems in setting up in EU markets, it is apparent that the issue is implementation of

investment regulations, the cumbersome nature of the paperwork involved, and associated technicalities of taxation, subsidiary versus branch issues, etc.

7.2 Regional and bilateral commitments

The following discussion highlights the EC's stand in various bilateral agreements with developing countries, focusing on modes and regulatory issues that are most pertinent to India in its negotiations with the EU. It also highlights relevant features of India's bilateral Comprehensive Economic Cooperation Agreement (CECA) with Singapore.

7.2.1 The EC stand on other agreements

It is worth examining whether the EC has gone beyond its multilateral commitments and offers in its PTAs and, if so, whether India can expect the same in its own talks. A quick perusal of various EC agreements including the EU-South Africa Trade, Development and Cooperation Agreement, the EU-Mexico and the EU-Chile Agreements shows that there is general declaration of the importance of facilitating trade in services through all four modes and the importance of dialogue and cooperation in the information and communication technology sector. The only aspect on which there is specificity and which is pertinent to computer and related services is data protection.

All these bilaterals contain a separate article on data protection, which includes provisions for cooperation to improve the level of protection accorded to the processing and transfer of personal data, taking into account international standards (which are provided in the Annex to the agreements). The provisions call for technical assistance, exchange of information, and joint initiatives in this area. The EU-Mexico agreement mentions the need to cooperate on the protection of personal data and to avoid obstacles to trade that requires transfers of personal data. Data privacy and issues of choice, notice, transfer, and processing of sensitive personal data have been a matter of concern for the EU in all its agreements and will feature in its negotiations with India. Thus, the gaps between the EU directives and Indian legislation could be a stumbling block in this sector.

On movement of natural persons, there is nothing in the EU's bilateral agreements except a statement of a longer-term objective of further liberalization and periodic review. As the issue of immigration and labor market policies is not in the EC's mandate and is driven by individual member country policies, this is not surprising. Excerpts from the EU's commitments pertinent to Mode 4 under the EU-Chile agreement are given in the box below.

Box 2: EU-Chile Agreement: Selected features of EC commitments in Mode 4

Mode 4 commitments

- Unbound except for measures concerning the entry into and temporary stay within a Member State, without requiring compliance with an economic needs test of the following categories of natural persons providing services:

- The temporary presence, as intra-corporate transferee, of natural persons in the following categories, provided that the service supplier is a legal person and that the persons concerned have been employed by it or have been partners in it (other than as majority shareholders), for at least the year immediately preceding such movement:
 - An “intra-corporate transferee” is defined as a natural person working within a legal person, other than a non-profit making organization, established in the territory of Chile, and being temporarily transferred in the context of the provision of a service through commercial presence in the territory of a Member State; the legal persons concerned must have their principal place of business in the territory of Chile and the transfer must be to an establishment (office, branch or subsidiary) of that legal person, effectively providing like services in the territory of a Member State to which the EC Treaty applies.
- Persons working in a senior position within a legal person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors or stockholders of the business or their equivalent, including:- directing the establishment or a department or
- Persons working within a legal person who possesses uncommon knowledge essential to the establishment's service, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.
- The commitments also cover natural persons engaged in the supply of a service on a temporary basis as employees of a legal person, who has no commercial presence in any Member State of the European Community, subject to the legal person obtaining a service contract, for a period not exceeding 3 months from a final consumer in the Member State concerned, through an open tendering procedure or any other procedure which guarantees the bona fide character of the contract (e.g. advertisement of the availability of the contract) where this requirement exists or is introduced in the Member State pursuant to the laws, regulations and requirements of the Community or its Member States.
- The natural person seeking access should be offering such services as an employee of the legal person supplying the service for at least the year (two years in the case of GR) immediately preceding such movement.
- The temporary entry and stay within the Member State concerned shall be for a period of not more than three months in any 12 months period (24 months in the case of NL) or for the duration of the contract, whatever is less.
- The duration of “temporary stay” is defined by the Member States and,

where they exist, Community laws and regulations regarding entry, stay and work. The precise duration can vary according to the different categories of natural persons mentioned in this schedule.

- All other requirements of Community and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements.
- The natural person must possess the necessary academic qualifications and professional experience as specified for the sector or activity concerned in the Member State where the service is supplied.
- The commitment relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Member State concerned.
- The number of the persons covered by the service contract shall not be larger than necessary to fulfill the contract, as it may be decided by the laws, regulations and requirements of the Community and the Member State where the service is supplied.
- Community directives on mutual recognition of diplomas do not apply to nationals of third countries. Recognition of the diplomas which are required in order to practice regulated professional services by non-Community nationals remains within the competence of each Member State, unless Community law provides otherwise. The right to practice a regulated professional service in one Member State does not grant the right to practice in another Member State.
- The service contract has to be obtained in specified activities, one of which is computer and related services and subject to the additional conditions mentioned in the subsector by the member state concerned.

EU's commitments in Computer and Related Services

- No restrictions on Modes 1,2,3 for consultancy services related to installation of computer hardware, software implementation services, database services, data processing services
- Unbound except for specified service providers for maintenance and repair services and other computer services
- Specified service providers include computer scientists, systems analysts, programmers, software document analysts and field engineers with university degree and three years' professional experience in the sector. In certain countries requirement of university degree or equivalent technical qualification demonstrating knowledge. Economic Needs Test may be required if wages fall under a certain threshold.

*Source: Schedule of Specific Commitments on Services, Annex VII,
Part A, Community's Schedule.*

The EU's commitments in this bilateral agreement cover the same categories as its commitments under GATS, namely, ICTs, business visitors, and specialists. Although the bilateral commitments also cover contractual service suppliers, there are conditions on the contract and prior employment conditions for the service provider; the duration of stay is three months or less within a year and is thus quite limiting. Member-specific regulations continue to apply over and above any EU-wide directives. Thus, the terms and conditions remain restrictive and similar to those under GATS.

*7.2.2 Relevant features of the India-Singapore CECA*¹¹

In the services commitment schedule, across all sub-sectors, namely consultancy services, software implementation services, data processing services, database services, and other computer services, Singapore has made unrestricted commitments in Modes 1, 2, and 3. Mode 4 is unbound as in its GATS commitments in this sector. Hence, India has not gained anything in terms of sectoral commitments from Singapore. India's own commitments in this sector are similar, with Modes 1, 2, and 3 being unrestricted and Mode 4 being unbound except for employees of juridical persons and for independent professionals having a contract with a client in India.

There are, however, some areas where there is improvement over the GATS commitments. There is greater clarity in definitions of different categories of service providers, and terms and conditions on entry and stay for each category. For instance, the understanding on movement of natural persons covers four categories of business persons, namely, business visitors, short-term service suppliers, professionals, and intra-corporate transferees from India and Singapore to enhance trade and investment flows between the two countries. The duration of stay is explicitly given and entry and stay are guaranteed for all specified categories. Business visitors who hold five-year multiple-entry visas are permitted to enter and engage in business activities for up to 2 months, extendable for another month. Short-term service suppliers are guaranteed temporary entry to service their contracts for an initial period of up to 3 months. Professionals employed in specific occupations, including the computer and related services sector, are allowed entry and stay of up to one year or the duration of the contract, whichever is less. Intra-corporate transferees are allowed to stay and work in India and Singapore for an initial period of up to two years or the contract period, whichever is less, and extendable for up to three years at a time for a maximum of eight years. The agreement ensures certainty of market access for Singaporean and Indian companies that wish to deploy their personnel to the country to manage their operations in the partner country.

The bilateral agreement provides a list of professionals pertinent to the computer and related services sector. These include network system and data communication analyst, software engineer, computer and information systems manager, computer operations and network manager, application programmer, systems programmer, multi-media programmer, network system and database administrator, information technology auditor, information technology security specialist, information

¹¹ India-Singapore Comprehensive Economic Cooperation Agreement (CECA), Information Kit, FTA website, Government of Singapore, Singapore's Schedule of Specific Commitments- Annex 7B, India's Schedule of Specific Commitments, Annex 7A.

technology quality assurance specialist, and system designer and analyst.¹² This comprehensive list provides a level of concreteness and detail to the Mode 4 commitments which is not present in the GATS commitments in this sector. Such clarity, detail, and comprehensiveness are the most important features of this agreement with a bearing on India's interests in the IT-ITES sector.

Another noteworthy feature of the India-Singapore CECA is the chapter on investment, taxation, and e-commerce, which has some bearing on India's negotiations with the EU.

8. Proposals for the Indo-EU Negotiations in IT-ITES

Several issues should be discussed in the Indo-EU talks in order to address the interests of India's IT-ITES providers. Some issues require measures by the EU, whereas others require initiatives by India. In certain areas, cooperation will be required between India and the EU at industry and government levels.

8.1 Issues for India to raise with the EU

In its negotiations with the EU, India should address all the issues highlighted in the section on barriers in the EU; it should also address movement of IT service providers, data protection, investment regulations, taxation, and labor market regulations, in order of importance. Specific proposals for each category are outlined below.

Movement of service providers

- Introduce a professional services visa for specified types of service providers or specifically for specified personnel in the IT-ITES sector
- Profiling and certification of companies rather than individuals, especially for repeat visits, based on established criteria
- Fast-track visa processing for select companies based on established criteria
- Transparency and prior notification, establishment of inquiry points regarding changes in laws and regulations that affect movement of service providers
- Develop common requirements and processes for processing visas and work permits within the EU
- Accept certification and legalization processes across EU member countries for movement of service providers, at least for business visitors
- Greater flexibility in use of business visas across member countries
- Create finer categories of visas between business visitor and work permit holder to address wider range of functions, and give more liberal market access to IP/domain knowledge-intensive functions
- Better delineation of business visa and work permit
- Ensure that the IT-ITES sectors are covered under the Blue Card scheme (see Appendix C) and can benefit from the new entry procedures and harmonized criteria

¹² Annex 9A of India-Singapore CECA.

Data protection

- Recognition of security systems of reputed Indian companies and of NASSCOM initiatives regarding data protection
- Empanel India as a data-secure country

Investment regulations

- Fast track selected companies for investment approval
- Harmonize investment procedures, requirements, and timelines within the EU
- Reduce obstacles to setting up branches as opposed to subsidiaries
- Clarify taxation of branches

Taxation

- Totalization agreements on an exemption and not on a refund basis, or at a minimum a sectoral carve-out from social security exemptions for the IT-ITES industry
- Link tracking of visas to social security exemptions
- Possible extension of totalization agreements to third countries on the basis of proven equivalence with social security systems
- Clarify taxation on offshore income for branches and agreement on withholding rates where not already in place
- Remove dividend withholding tax
- Tax exemption on personal or dispensation allowance provided to on-site service providers, up to a reasonable limit
- Reduce tax rate on dispensation allowance
- Sectoral carve-out from economic needs tests, local staffing conditions, and working hours and overtime-related restrictions based on the characteristics of this sector and skill shortages in the EU market

Labor market regulations

India should negotiate chapters on investment, taxation, e-commerce, and cooperation on data protection, and arrive at a comprehensive list of professions/occupations that cover its interests in the computer and related services sector. The India-Singapore CECA can provide the basis for this list of professions.

Given the EU's internal mandate, it may not be feasible to pursue all these areas. Prioritization and a multi-pronged strategy of regional and bilateral negotiations may be required.

In order of priority India should negotiate the following:

- (1) Movement of service providers should be addressed as a matter of priority. This partly depends on the outcome of the proposed EU's blue card scheme. The EU blue card would address concerns such as long timelines, differences in procedures across member countries, and problems of intra-EU mobility. India should ensure that computer and related services sector and relevant categories of service providers are included under this scheme.

- (2) In data protection, the main issue is to get India recognized and empanelled as a data secure country for outsourcing of sensitive data. This requires sensitizing EU authorities to data protection norms in Indian IT-ITES companies and existing Indian legislation. (India would also be required to take measures to close the gap between the EU's Data Protection Directive and India's legislation, as discussed in Section 9.1).
- (3) On investment regulations, there are likely to be difficulties doing this on an EU-wide basis. At the EU-wide level India should stress the need to harmonize criteria, procedures, and timelines across EU member countries. At the same time it needs to focus on particular EU markets to streamline investment regulations and remove conditions such as local staffing. The main markets are the UK, Germany, the Netherlands, and the Nordic countries where Indian IT companies have made the most investments; Central and Eastern European Countries, such as Hungary and the Czech Republic, are also important as some Indian ITES companies have located in these markets to provide near-shore presence to clients in the rest of the EU.
- (4) Taxation issues need to be addressed by entering into totalization agreements with selected countries. There is scope for such agreements as shown in the gap analysis between India's PF/employee contribution schemes versus the social security schemes of EU countries. India should focus on obtaining exemptions on withholding taxes and rate reductions on dispensation allowances. This requires bilateral tax treaties to be signed. Taxation issues should be considered in terms of their implications for commercial presence by Indian firms in the EU and in terms of the deployment of services providers by Indian firms to the EU.

It will be difficult to negotiate proposals pertaining to labor market regulations, such as overtime and number of working hours. However, India could negotiate a sectoral carve-out for economic needs tests with regard to the movement of IT workers and the removal of labor staffing conditions when commercial presence is established on the grounds of local skill shortages.

The following discussion elaborates on some of these proposals. (Data protection is not addressed here as the proposal has been outlined in (2) above and its domestic aspects are discussed in Section 9.1).

8.1.1 Service provider mobility issues

The administrative complexity and timelines involved in processing visas and work permits need to be reduced. One solution is to introduce a professional services visa along the lines of what India sought in the WTO services negotiations. The features of this visa could include multiple entry for 2-3 years, which is exempt from social security taxation, not subject to quotas, minimum wages, or economic needs and labor market test requirements, and is issued to persons who meet a specified threshold level of educational qualifications (possibly a B.A. or higher), or who have proven prior experience in the area. Thus, this visa would be similar to what was proposed under GATS, except that companies want a slightly longer duration of 2-3 years as it takes time for the IT service provider to learn the task, deliver the service, and transfer

his knowledge before returning. Social security and other taxes, such as the tax on living allowance/ dispensation, could be tied to this visa and would serve as a mechanism to track service providers from entry to their return.

To streamline visa/work permit processing, India should negotiate for EU immigration authorities to move towards profiling organizations rather than individuals; it is easier to profile organizations rather than individual employees. EU authorities could rank companies using criteria such as turnover, employment size, listing on the stock market, number of persons sent on average per year, previous record of employees in other markets, etc. The onus for verification would be on establishments since the employee would have been screened by the company and by the host country's authorities on his/her previous visit. A faster certification process should be set up for establishments that send personnel on a regular basis and which were screened in the past. This company-centric approach has the advantage that the company's reputation is at stake and they would carefully screen their employees, ensure that they return, and penalize any violations. As the volume of business with the EU increases, it will become increasingly important to streamline the processing of visas and work permits.

To quote one respondent, "If the first issuance has gone well, then repeat cases can be done faster – in three days. Successive applications for the organization can be streamlined. It is important to see the service provider as an employee of an organization and not as a person, and to put the onus on the employer. Corporate branding is required." The issue of corporate branding is especially pertinent to business visitors as such movement is linked to the company and the person has already been vetted by his/her company., It should be possible to reduce the documentation required for business visitors, especially for repeat visits, and give such visas on arrival based on company credentials. Further, a uniform 90-day business visa could be given across member countries, which would enable critical business deals to be closed.

On the issue of intra-EU mobility of service providers, India should negotiate for member countries to recognize each other's work permits for specified categories of personnel (who provide specialized and domain knowledge-related services) and for companies that need to move personnel around within the EU and also meet established criteria. At a minimum, members could set common parameters for work permits and business visas, and have more commonality in procedures, timeframes, and requirements. They could accept the certification and verification of applicants and contracts by other member countries. This would make it easier for Indian companies to move persons across their branches and subsidiaries. India should negotiate for more flexibility in intra-EU mobility of business visitors. While it is possible to move across EU member countries with a Schengen visa, business visitors are required to first enter the country issuing the visa and spend the maximum amount of time in that country. EU authorities could relax conditions regarding allocation of time and stay within the EU and provide more flexibility to business visitors.

Much depends on the outcome of the EU blue card scheme. The blue card scheme calls for common definitions, criteria, and procedures among EU members regarding the admission of economic migrants, while giving room to member countries to respond to the specific needs of their labor markets. The possibility of promoting

intra-EU mobility of Indian IT personnel under this scheme should be explored. India could use this opportunity to establish a common fast-track procedure to admit temporary service providers across EU member countries in sectors where there are clearly identified skill gaps and where one Member State has already screened and granted admission to the person. The economic needs test could be waived in identified skill shortage areas when the person moves across member countries. Prior successful work experience in another EU country and a good return record could be used as criteria to facilitate readmission and intra-EU mobility. A centralized information system which provides information on all past admissions and returns will help fast-track the process for such personnel. Providing more favorable treatment in terms of readmission and movement across EU countries for such bonafide service providers would be in the interests of both Indian companies and their EU clients, and would encourage knowledge circulation.

Although it is not for India to suggest the scope and features of the blue card scheme, it would be useful for the IT-ITES industry if the EU considers this sector as one that provides special skills that the EU requires. A common framework needs to be developed at the EU level for skilled service suppliers, including IT personnel. The criteria could be years of experience, educational levels, language skills, domestic skill requirements of the EU member country, etc.

The issues of transparency and prior notification need to be addressed. India should negotiate for access to information through inquiry points about changes in laws and regulations in EU member countries that affect the movement of its service providers.. India would need to reciprocate such transparency.

8.1.2 Creating finer visa classifications

India should negotiate for additional visa categories that fall between a business visa and a work permit. This would be relevant for persons who are sent for short durations of about a month for scoping and analysis but not for business development or ongoing on-site work. Thus, categories akin to the investor or specialist visas need to be included by the EU. Such a visa should not be conditional on commercial presence or social security contributions and should be issued on a fast-track basis. Some categories which could be covered under this intermediate visa category would be project managers, scoping analysts, engineers, and personnel who go for short initial phases of a project and then return for project development. This category would be pertinent for Indian firms entering into outsourcing contracts as it would facilitate the movement of senior personnel who go to the client location to understand processes and transfer knowledge to the offshore delivery center in India. Thus, the demand is for a visa category which meets the requirements of the IT-ITES sector's business model.

If a new visa category is not possible, at a minimum the business visa and work permit need to be clearly delineated so that there is no misuse or misinterpretation of the two. By delineating the two, there may be scope to include activities which are more specialized, IP-oriented, and of short duration under the business visa category.

This new visa category could be created along the lines of the **US HR 888 bill** (see Appendix D) which amends the immigration and nationality act of the US to include

business facilitation visitors from a qualifying country as non-immigrant aliens visiting the US temporarily for business under the Business Travel Facilitation Act of 2007. The bill defines such visitors as those: (1) providing services pursuant to a qualifying services contract; or (2) providing management or technical training to or receiving management or technical training from personnel of a US entity. This falls between the EU categories of business visitor and work permit holder. The definition of a “business facilitation visitor” under this act could be proposed to the EU to enable gradation of visa categories for the IT sector. Indian authorities could negotiate similar terms for this new business facilitation visitor category, which is granted a period of authorized admission of: (1) one year with a one-time six-month extension for someone providing services; and (2) one year for providing or receiving management or technical training. Thus the period would be longer and the terms more flexible for such personnel; this would be of great significance for the IT-ITES industry which needs to send people for training, transfer of knowledge, and understanding client processes before a contract can be undertaken. There could be riders on this visa to prevent conversion to immigrant status and issuance could be made conditional on a company’s past record in adhering to the terms and conditions of the visa.

8.1.3 Streamlining and harmonizing investment regulations

Although India’s focus has been on Mode 4 issues, in light of the significant overseas commercial presence of Indian IT-ITES firms in the EU and its link with Mode 4 the Indo-EU TIA discussions should focus on streamlining investment regulations and, if possible, greater harmonization in procedures and requirements across EU member countries. The timelines in EU member countries should be reduced to reasonable levels and, if possible, to a common timeline. There could be mechanisms to fast-track the setting up of subsidiaries and branches for companies that meet specified criteria. As in the case of Mode 4, companies that have been approved for setting up commercial presence in one EU country could be exempted from similar procedures when setting up in another EU member country within a specified time period (say, six months or one year). Thus, the scope for recognition of investment approval procedures and verification and legalization processes in one EU member country across EU member countries needs to be explored in the Indo-EU TIA discussions. Some degree of harmonization or benchmarking of investment approval processes should be negotiated. This would facilitate the movement of service providers into individual member countries as well as across EU countries.

On the investment issue, there needs to be clarity on taxation of branches and the allocation of taxable income between the branch and the parent company. Also, efforts should be made to reduce the differences in investment approval requirements for branches compared to subsidiaries, as well as differences in branch registration requirements across member countries.

8.1.4 Taxation agreements

As with labor laws, it is not possible to negotiate with the EU on tax rates and the high incidence of taxation in the EU. However, one issue that can be addressed is exemption of social security taxes for temporary IT personnel. This can be done through totalization agreements with a larger number of EU countries. India should

highlight the equivalence between the coverage provided by India's PF/ ESI schemes the EU's social security system as well as the insurance schemes and benefits provided by Indian IT companies. While totalization agreements have to be negotiated bilaterally, efforts could be made to extend totalization agreements to other member countries by setting benchmarks that are accepted across countries within the EU. The timeframe proposed for totalization agreements ranges from 3 to 5 years. Any totalization agreement should be exemption-based rather than refund-based (the latter involves administrative complexities). If exemptions from social security contributions are linked to the proposal for a professional services visa or the introduction of new visa categories, it would provide a means to track entry, stay, and return, and fulfillment of the conditions of the concerned visa category. Simultaneously, India needs to continue with bilateral discussions for totalization agreements and for double taxation avoidance agreements (which it already has with some EU member countries). If it is difficult to establish broad-level equivalence with the social security systems in EU member countries, a sectoral carve-out in terms of exemption from social security contributions could be considered for Indian IT-ITES providers on temporary visits to the EU.

Another important issue is taxes on offshore income of branches of Indian IT-ITES companies, where part of the income may be attributable to its work for clients based in the EU. India should reach an understanding with all EU countries on how such offshore income is to be treated – whether this will be exempt altogether or if withholding taxes would be applicable and, if so, it should arrive at a consensus with all EU countries on the applicable tax rate. India should negotiate exemption on withholding taxes on dividend income and exemption of dispensation allowances from taxation within reasonable limits. Bilateral tax treaties covering these issues should be pursued with the main markets where Indian companies are choosing to locate within the EU.

In this context, India should explore the possibility of **advance tax ruling** and **advance pricing agreements** (see Appendix F). This ruling, which India has with the Netherlands, enables companies to have more certainty about taxes affecting their establishments in the Netherlands even before the investment is located there, and gives them clarity on transfer-pricing issues. It enables the determination of an arm's length remuneration for finance and royalty activities, activities of an auxiliary, and tax obligations of different kinds of companies set up in the Netherlands, thus facilitating investment decisions, choice of location, and type of establishment. While taxation is again an individual member country issue, India could explore the possibility of greater harmonization among EU countries through advance tax rulings.

8.1.5 Flexibility in labor market regulations

In this area, little can be done given the realities of the labor market in many EU countries. However, the discussions could address three issues. The first is to recognize the business model in the IT-ITES sector and introduce flexibility in the application of labor laws with regard to number of working hours and overtime. It is worth negotiating the derogation from labor laws for this sector given the shortage of IT service providers in the EU and the need for personnel from overseas. The second issue is the possible exclusion of this sector from the economic needs test requirement, since IT skills are in short supply in the EU. The third issue is the

removal of local labor staffing conditions in a few EU countries that lack of skilled local personnel.

8.2 Demands on India by the EU

There are unlikely to be any major demands on India in this sector in the form of sector-specific reciprocal concessions against the demands placed by India on the EU. Since India's policies are already very liberal in this sector, its interests should be addressed through concessions in other sectors, such as financial services, or concessions on industrial tariffs.

For EU companies, the main issues in these negotiations are likely to be regulations that affect their commercial presence in India in the form of captive subsidiaries and development centers, the associated movement of persons, and the ability of Indian companies to meet outsourcing-related regulatory requirements.

Getting an Indian business visa is a problem for EU companies. India needs to make its own business visa processes more streamlined and transparent, quicker, of longer duration and uniform in its conditions, and easier to extend. Indian consular authorities need to be better informed and equipped to process visas more quickly.

It is also in India's interests to sign a government procurement agreement as this could open up opportunities for Indian IT firms in the government outsourcing space. Indian IT firms see a lot of potential in the EU's government outsourcing market but have not tapped this market. Greater willingness by India to enter into a government procurement agreement with transparency in bidding and tendering procedures and a level playing field for foreign service providers could make EU governments more willing to outsource major contracts in the public utilities and social services sectors to Indian IT companies.

9. Domestic Reforms in India

In certain areas, India needs to address domestic regulatory gaps and institutional shortcomings to facilitate its trade in IT-ITES with the EU. The main domestic reform areas are outlined in this section.

9.1 Strengthening data protection

Sensitivity of information, especially transfer and forwarding of personal information, is an important issue in doing business with the EU. A two-pronged approach is required to address this issue.

The first step is to pass the pending IT Act and address gaps in this legislation with regard to data transfer, forwarding, and prior informed consent and choice. There are gaps between existing Indian legislation and EU directives on data protection as well as the EU-US safe harbor provisions. Like the US, India should consider having sectoral laws on data protection. India should address its institutional shortcomings in the area of data protection by setting up an authority to deal with data protection violations and to enforce the provisions of the IT Act. The government should facilitate NASSCOM's initiative to set up a cybercell and special court to enforce data

protection violations. Such measures would help India get empanelled as a data secure country by EU authorities.

These steps would enable India to negotiate a safe harbor agreement with the EU along the lines of the agreement signed between the EU and the US.¹³ Such an agreement would bind all Member States of the EU regarding data adequacy in India and all Indian companies participating in the safe harbor would be deemed adequate for data flows from the EU. Companies that self-certify to the safe harbor framework would publicly declare that they do so, including on aspects of notice, choice, access, and enforcement. In order to qualify for safe harbor, these companies could either join a self-regulatory privacy program that adheres to the safe harbor requirements or develop a self-regulatory privacy policy that conforms to the safe harbor provisions. They would need to put in place a dispute resolution system that investigates and resolves individual complaints and have procedures to verify compliance. Companies can satisfy these requirements through compliance with government supervisory authorities or by committing to cooperate with data protection authorities in the EU. The only area where India may have some limitations is that claims brought by EU citizens against Indian companies may not be accepted for hearing in India given the inadequacies of India's legal system; however, the measures of setting up a special court and punitive action by companies or the government may help.

Simultaneously, Indian IT-ITES companies need to improve their security systems and processes. Some companies are already largely compliant with EU data protection requirements but have to address remaining issues, like appointing a data protection officer. Indian companies should penalize violations and link their data protection systems with their own policies on employee screening and certification. This would enable Indian companies, especially the large and well-reputed ones, to sign on to the EU's model clauses on data protection. As this will involve costs, which only the larger companies will be able to bear upfront, a phased approach can be followed where the government supports small and mid-size companies by giving them more time to sign on to the model clause. NASSCOM's initiative to evolve a certification scheme for data protection like CMM would facilitate such self-regulation by companies. To get outsourcing contracts, companies should look at markets which are authorized by the EU for transfer of data. Overall, government and NASSCOM efforts should enable Indian companies to regulate themselves and get access to the EU market.

9.2 Certification and documentation processes in India

The certification and documentation processes in India need to be improved to facilitate the movement of IT personnel. As suggested by one respondent, "The Indian government should consider putting in place an agency to replace these functions being done by the MEA, including at the state level where the verification of documents occurs. ... With a move towards e-government, it should be possible to digitize a lot of these processes and speed them up. A National ID card scheme would help which could be done via a social security number or the PAN card. Databases could be interlinked.... An online data base would permit one to track mobility as

¹³http://www.export.gov/safeharbor/sh_overview.htmlhttp://www.export.gov/safeharbor/sh_workbook.html

well.” The basic problem is that India’s institutions and certification processes lack credibility. India has already signed the Apostille Convention (see Appendix G), but procedural problems remain with delays in getting documents screened and attested at various levels of government especially at the state level. However, until a social security or other internal tracking system is devised, it may be difficult to streamline internal documentation and attestation systems.

10. A Reality Check on the India-EU TIA Negotiations

While many proposals have been advanced and many issues highlighted for discussion with the EU, one needs a reality check on the feasibility of such proposed measures given the EU mandate. If one assesses the proposals in this light, many issues flagged above may prove difficult to negotiate. For example, harmonization of EU procedures and requirements for visas and work permits or for investment authorizations will largely depend on progress within the EU with its Blue Card proposal which could take two or three years to materialize. Likewise, introducing more flexibility in labor market regulations, with possible derogations from these laws for the IT-ITES sector, may not be possible given the strong labor unions and political opposition to outsourcing in many EU countries. A common understanding on social security tax exemptions may similarly not be possible. Harmonization of investment procedures and establishment criteria may be difficult to negotiate, especially since within individual EU member countries there are differences across regions and provinces. The difficulties in pursuing some of these issues stem from the EC mandate as well as internal realities of the EU member economies, which gives them autonomy on certain issues.

Hence, it may not be possible to address some of India’s central concerns EU-wide; instead, they have to be dealt with bilaterally. Social security, investment and taxes need to be addressed bilaterally through totalization agreements, bilateral investment treaties, and double taxation avoidance agreements. Even when there is scope to cover some issues, the EC mandate either provides for possible derogations or limits the scope of coverage. For instance, it specifies that the approach to Mode 4 is to have an automatic commitment for categories that are linked either to establishment or to cross-border supply of services, i.e., business visitors, key personnel like intra-corporate transferees, managers, and executives, and graduate trainees, but does not mention contractual service suppliers, which is the category of most interest to the IT-ITES sector. Further, the mandate notes that the EC could derogate from this automaticity for selected sectors by inscribing sector-specific reservations on key personnel and graduate trainees based on a negative list. Hence, the EC is not broad in the scope of its Mode 4 “automatic” mandate, leaving out categories of interest to India and also reserves the possibility of sector-specific restrictions. On data protection, the onus lies on the Indian side.

Thus, many of India’s interests in the IT-ITES sector may not be achievable through a TIA with the EU as the latter is unlikely to concede on key matters like movement of service providers and India may have to negotiate bilaterally. However, India should put the points discussed in this paper on the negotiating table and highlight their relevance in the context of the EU’s single market initiative and its services directive, which clearly recognize the importance of facilitating intra-EU movement of service providers as well as establishments, and the need within the EU to undertake related

harmonization of regulations, development of codes of conduct, administrative cooperation, and coordination of national legislation. The services directive notes that a fragmented market within the EU hurts the entire EU economy. Thus India should try to align its proposals in these negotiations with the longer-term EU vision of a single market in services and justify these proposals as being in the EU's own long-term interests and vision.

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and http://www.export.gov/safeharbor/sh_workbook.html

Appendix A

Annex on Understanding Scope of Coverage of Computer and Related Services, CPC 84

- (i) CPC 84 covers the basic functions used to provide all computer and related services: computer programs defined as the sets of instructions required to make computers work and communicate (including their development and implementation), data processing and storage, and related services, such as consultancy and training services for staff of clients. Technological developments have led to the increased offering of these services as a bundle or package of related services that can include some or all of these basic functions. For example, services such as web or domain hosting, data mining services and grid computing each consist of a combination of basic computer services functions.
- (ii) Computer and related services, regardless of whether they are delivered via a network, including the Internet, include all services that provide:
 - consulting, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, support, technical assistance, or management of or for computers or computer systems; or
 - computer programs defined as the sets of instructions required to make computers work and communicate (in and of themselves), plus consulting, strategy, analysis, planning, specification, design, development, installation, implementation, integration, testing, debugging, updating, adaptation, maintenance, support, technical assistance, management or use of or for computer programs; or
 - data processing, data storage, data hosting or database services; or
 - maintenance and repair services for office machinery and equipment, including computers; or,
 - training services for staff of clients, related to computer programs, computers or computer systems, and not elsewhere classified.
- (iii) enable the provision of other services (e.g., banking) by both electronic and other means. However, there is an important distinction between the enabling service (e.g., web-hosting or application hosting) and the content or core service that is being delivered electronically (e.g., banking). In such cases, the content or core service is not covered by CPC 84.

Appendix B

Barriers in the EU

1. Constraints related to immigration policies

The table below shows that there are long and variable time lines in getting an EU work permit or visa.

Table A 1: Timelines and conditions for work permits/ visas in selected EU countries

S. no	Country	Timeline			Minimum Wage	Others ^{a/}
		Work-permit		Business		
		Short	Long			
1	Germany	NA	12 weeks	5 days	NA	Statement of work mandatory
2	UK	NA	3 weeks	5 days	£2106 p.m.	Contract to register with UK Work Permit also.
3	Netherlands	4 weeks	3 weeks	7 days	Short - €4167 pm Long - €46000 pm	Legalization of documents
4	Belgium	NA	8 weeks	5 days	€2689 p.m.	Legalization of documents and Police clearance certificate
5	France	4 weeks	12 weeks	4 days	€3300 pm to €4121 pm	Dependent visa can't be stated separately. Biometrics involved
6	Czech Republic	NA	5 weeks	5 days	CZK 200000 p.a.	Complex process for long-term visa
7	Ireland	NA	8 weeks	10 days	EUR 500 per week	50:50 rule; need to have equal local hires.
8	Austria	6 weeks	10 weeks	14 days	N.A.	Legalization of documents
9	Norway	NA	12 weeks	7 days	NOK 475512 p.a.	
10	Sweden	NA	7 week	5 days	NA	
11	Italy	NA	15 week	14 days	NA	
12	Poland	NA	10 week	10 days	NA	Local presence needed to file application

S. no	Country	Timeline			Minimum Wage	Others ^{a/}
		Work-permit		Business		
		Short	Long			
13	Denmark	NA	6 weeks	7 days	DKK 426000 p.a.	
14	Croatia	NA	6 weeks	7 days	NA	
15	Finland	NA	8 weeks	14 days	NA	

Source: Field survey of Indian IT companies

Note:

a/ Additional conditions applicable to each of the countries listed above include:

1. *Germany. Statement of work (SOW) is mandatory to file the application. Verification of certificates may be asked for on a case-by-case basis. This takes 4-5 weeks. Final stamping needs to be done at the place where the initial application was made.*
2. *UK. Must have a signed contract and the same is required to be registered with Work Permits UK.*
3. *Legalization is required for original certificates for a long-term visa application. Personal appearance is required for stamping of long-term work permit. Dependant visas when applied separately involve long lead time. Short Term Work Permit (STWP) cannot be converted into Long-term Work Permit (LTWP). Schengen rule applies for STWP travels.*
4. *Belgium. Legalization of documents is required. A legalized Police Clearance Certificate is required. Dependant visa when initiated separately needs additional documents from employee in Belgium.*
5. *France. Dependant Visa cannot be initiated separately. STWP cannot be converted into LTWP. Schengen rule applies for STWP travels. Biometrics involved for Visa stamping. Salaries need to differ for married and single applicants. Has a long holiday list and few staff in labor offices to supplement already existing delays. Long lead time in tourist season for visa application appointments*
6. *Spouse traveling on a short-term visa when long-term visa is in process. Employee and the dependent have to travel back to India for long-term stamping. Final stamping needs to be at the place where the initial application was made. Long-term visas need accommodation proof. Long-term visas take minimum 120 days for approval to be granted.*
7. *Ireland. 50:50 rule applies; need to have equal local hires for deputing employees from India. Dependant visas can be filed only 3 months after employee travels to Ireland and can take up to 9 months for approval.*
8. *Austria. Legalization of birth certificate for residence visa application, personal appearance during residence documents submission. Employee can commence work only after the work permit approval is received in Austria.*
9. *Norway. Dependant visa filling at the consulate only if initiated separately.*
10. *Sweden. Legalization of marriage and birth certificate. Personal interview required for first time business visa applicants and work permit applicants.*
11. *Italy. Invitation letter has to be faxed directly to the embassy. Local presence needed to file application.*
12. *Poland. Legalization of marriage and birth certificate. Personal interview required for first time business visa applicants and work permit applicants.*
13. *Denmark. No additional requirements found*
14. *Croatia. Corporate documents from the client are mandatory*
15. *Finland. Corporate documents from the client are mandatory*

The ability to get work permits is often the main driver of where business takes place. A 2001 survey found that Indian IT companies lost \$30 billion worth of business due to visa and procedural delays. A PWC survey of 51 government agencies found that the range of time taken for issuing visas and work permits varies from a few weeks for the UK, 1-2 months for the bulk of EU countries, and over 5 months for Portugal and Spain. Such long time lines are often disproportionate to the time that the person actually stays in the EU country. The work permit process could account for as much as 25% of the total time s/he actually spends in the EU country.

The legalization requirements are cumbersome. Several EU countries insist on extensive local legal verification of documents. Original documents such as birth certificates and educational degrees have to be certified and legalized by authorities at the place of issue. Embassy certification of signatures takes a long time. The certifying person is required to appear in person at the concerned embassy or consulate. There are also language related issues as EU countries require the documents to be translated into their local language and have the translation acertified. These problems have arisen because India, until recently, was not a member of the Apostille Convention which provides for mutual acceptance of documents among all members.

Each EU country works like a separate market with its own requirements, procedures, and timelines. There is no EU-wide concept of facilitating labor mobility by non-EU nationals within the EU region. This prevents Indian companies from moving staff from one EU country to another and they may be forced to bring in fresh resources from India. Although a Van der Elst visa can be availed of by non-EU employees who have been working for a service provider in a European Economic Area (EEA) member country for more than 12 months,¹⁴ not all EU member countries recognize this visa.¹⁵

2. Constraints related to Data Protection

The EC's Directive on Data Protection prohibits the transfer of personal data to non-European Union nations that do not meet the European "adequacy" standard for privacy protection. The EU uses comprehensive regulation (as opposed to a mix of legislation, regulation, and self regulation in the US) which requires the creation of government data protection agencies, registration of data bases with those agencies and, in some cases, prior approval before personal data processing can be done. The following box highlights key features of this Directive which are pertinent to Indian ITES companies doing offshore work for EU-based clients; the most restrictive aspects are underlined.

¹⁴ This pertains to a 1994 ruling by the European Court of Justice relating to the right of an European Economic Area (EEA) company to provide services across the EEA without the need to obtain additional work permits. This "Van der Elst" ruling has evolved into a new type of visa category, called "Van der Elst visas" in some EU countries. This visa aims at benefiting member countries for the free movement of service providers within the region. See Baldoni (July 2003), notes on Van der Elst Visas, Judgment of the Court of 9 August 1994.

¹⁵ The European Court has also rejected arguments such as preventing abuse, protection of domestic workers, and legal certainty advanced by some member countries. It has ruled that Member States may not require any minimum prior period of employment before a non-EU national can be sent to provide services within the EU on behalf of his employer and has also ruled against any prior visa requirements.

Box A 1: Selected features of the EU Directive on Data Protection

The Directive has two basic objectives: first, to protect individuals with respect to the “processing” of personal information; and second, to ensure the free movement of personal information within the EU through the coordination of national laws (Article 1).

Personal information is defined as information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity (Article 2).

The scope of the Directive is very broad. It applies to all processing of data, on-line and off-line, manual as well as automatic, and all organizations holding personal data. It excludes from its reach only data used “in the course of purely personal or household activity” (Article 3). The Directive establishes strict guidelines for the processing of personal information. “Processing” includes any operations involving personal information, except perhaps its mere transmission (Article 2). For example, copying information or putting it in a file is viewed as “processing.” The substantive aspects of the Directive’s privacy protections are based on the Guidelines on the Protection of Privacy and Transborder Flows of Personal Data adopted by the Organization for Economic Cooperation and Development (OECD) in 1981.

Data Quality. The Directive requires that all personal information must be processed fairly and lawfully, so that, for example, a person whose personal information is at issue knows that it is being collected and used and must be informed of the proposed uses. Furthermore, the use of personal information must be limited to the purpose first identified and to other compatible uses, and no more information may be collected than is required to satisfy the purpose for which it is collected. In other words, the theory is that if a person provides information to obtain telephone service, that information should not be used to target that person for information about vacation trips, nor should information relevant to a customer’s interests in vacation trips be required to get, for instance, telephone service. Information must also be kept accurate and up to date (Article 6).

Legitimate Data Processing. The Directive sets forth rules for “legitimate” data processing. Most basically, this requires obtaining the consent of the data subject before information is processed unless specific exemptions apply (Article 7). In addition, certain information must be provided to data subjects when their personal information is processed (Article 10), such as whether they have rights to see the data, to correct any information that is inaccurate, or to know who will receive the data (Article 12).

Sensitive Data. “Sensitive” data, such as that pertaining to racial or ethnic origins, political or religious beliefs, or health or sex life, may not be processed at all unless such processing comes within limited exceptions, for

example if the individual gives explicit consent (Article 8).

Security. The Directive requires that “appropriate technical and organizational measures to protect data” against destruction, loss, alteration, or unauthorized disclosure or access be taken (Article 17).

Data Controllers. The Directive requires those processing data to fulfill very specific requirements. Specifically, they must appoint a “data controller” responsible for all data processing, who must register with government authorities (Article 19) and notify them before processing any data (Article 18). Notification must at a minimum include: the purpose of the processing; a description of the data subjects; the recipients or categories of recipients to whom the data might be disclosed; proposed transfers to third countries; and a general description that would allow a preliminary assessment of whether requirements for security of processing have been met (Article 19).

Government Data Protection Authorities. The Directive also mandates a government authority to oversee data processing activities. Each Member State must establish an independent public authority to supervise the protection of personal data. These "Data Protection Commissions" must have the power to: (1) investigate data processing activities and monitor application of the Directive; and (2) intervene in the processing and to order the blocking, erasure, or destruction of data as well as to ban its processing. They must also be authorized to hear and resolve complaints from data subjects and must issue regular public reports on their activities (Article 28).

Transfers of Data Outside the EU. Most importantly from the U.S. perspective, the Directive requires that Member States enact laws prohibiting the transfer of personal data to countries outside the European Union that fail to ensure an "adequate level of [privacy] protection" (Article 25). Where the level of protection is deemed inadequate, Member States are required to take measures to prevent any transfer of data to the third country. Member States and their Data Protection Commissions must inform each other when they believe that a third country does not ensure an adequate level of protection.

Source: http://www.export.gov/safeharbor/sh_overview.html and http://www.export.gov/safeharbor/sh_workbook.html

India is not empanelled by the EU for data transfer as it is not seen as having adequate standards for privacy protection. This prevents jobs which involve live and confidential data on European citizens from being outsourced to India. Indian call centre companies which work with live customer data are the most affected. At present Indian service providers sign data confidentiality, IP and other data protection clauses in their Service Line Agreements (SLAs). Usually, these are two- to three-year agreements; however, EU clients often ask for life-time or 10-year data confidentiality agreements and may insist on the liability of the company in case of any violations. The EU directives require even subcontracting parties to conform to data protection laws.

It is difficult to estimate the costs imposed by the EU's data protection requirements. There are costs due to delays in getting the information and commencing work; auditing costs to certify that data security and employee screening requirements have been met; and costs of contracts that cannot be secured. SMEs face higher costs of compliance than larger companies. Some Indian firms work around the EU's stringent data protection laws by establishing centers in countries such as Hungary which have good data protection legislation and are authorized by the EU for data transfer.

3. Constraints related to Investment

The main concerns with EU investment regulations are the variability in procedures across EU member countries and the long timelines for some countries. Each country has its own sub-jurisdictional requirements and processes, some of which are cumbersome. Every director on the board of the company may be required to be physically present when signing. EU investment regulations do not distinguish between low-value and high-value business proposals in terms the procedures and timelines. There are also differences in the ease of establishment and operations between branches and subsidiaries; Indian IT-ITES companies are not free to exercise the option that best suits their delivery model and bottom-line. Finally, there is no harmonization within the EU; a company that wishes to set up presence in multiple EU locations is required to undergo the entire process each time.

One company discussed how setting up a branch in Sweden took four months. The company's initial set of documents was found to be inadequate and was returned; it had to get its documents certified by a live incorporated company in India and the Registrar of Companies was required to attest the company certification of incorporation. The Swedish government then wanted a list of all directors, executing, non-executing, and independent, based on the company's annual report; the home addresses of all the executive directors had to be notarized and the company had to justify the non-inclusion of independent and non-executing directors to the government authorities.

Unpredictable timelines and delays in getting approvals to set up overseas offices hurt the execution of business deals and delay filing for work permits and sending resources to the site. The UK is, however, seen as the most facilitative of investments and is thus seen as a strategic entry point to the larger EU market.

Secondary sources confirm the variation in the regulatory environment across EU countries and the presence of regulations which raise the costs of doing business in the EU. The following table provides the World Bank's country rankings for ease of doing business based on nine parameters: (a) Starting a Business; (b) Dealing with Licenses; (c) Employing Workers; (d) Registering Property; (e) Getting Credit; (f) Protecting Investors; (g) Paying Taxes; (h) Trading Across Borders; and (i) Enforcing Contracts and Closing a Business. It highlights the differences across EU countries and corroborates the earlier findings about the difficulties in doing business in certain markets, such as France, compared to others, such as the UK.

Table A 2: Ease of doing business: Country rankings

Country	Ease of doing Business (Rank)
UK	6
Denmark	7
Norway	9
Ireland	10
Sweden	13
Finland	14
Lithuania	16
Estonia	17
Belgium	20
Germany	21
Netherlands	22
Austria	30
France	35

Source: World Bank (2007) <http://www.doingbusiness.org/economyrankings/?regionid=0>

These rankings were further dissected for three countries – the UK, Sweden, and Germany – to examine factors that contribute to the relative ease of conducting business.

Table A 3: Factors contributing to ease of doing business

Economy	UK	Sweden	Germany
Activity	6	13	21
Starting a Business	9	20	66
Dealing with Licenses	46	17	21
Employing Workers	17	94	129
Registering Property	19	7	42
Getting Credit	1	33	3
Protecting Investors	9	46	83
Paying Taxes	12	39	73
Trading Across Borders	14	9	7
Enforcing Contracts	22	2	29
Closing a Business	10	17	28

Note: Numbers indicate rank.

Source: World Bank (2007), <http://www.doingbusiness.org/economyrankings/?regionid=0>

The critical factors that lead to differences across EU member countries in terms of their business environment are: (a) starting the business; (b) investor protection; (c) payment of taxes; and (d) employment of workers. The following tables examine the first two factors. (The other two factors are discussed in Sections 6.1 (d) and 6.1 (e), respectively and are also discussed in sections (4) and (5) of this appendix).

Table A 4: Starting a Business

Starting Business	UK	Sweden	Germany
No. of Procedures	6	3	9
Time (days)	18	16	24
Cost (% GNI)	0.7	0.7	5.1
Min. capital (% GNI)	0	33.7	46.2

Source: World Bank (2007) <http://www.doingbusiness.org/economyrankings/?regionid=0>

Table A 5: Investor Protection¹⁶

Protecting Investors	UK	Sweden	Germany
Disclosure Index	10	6	5
Investor Protection Index	8	5.7	5

Source: World Bank (2007) <http://www.doingbusiness.org/economyrankings/?regionid=0>

Performance requirements are also imposed on foreign investors in the form of job creation (see Section 6.1 (c)) or investment minimums for establishing, maintaining, or expanding an investment. However, for the most part there are no explicit regulatory barriers and most barriers are administrative and implementation-related.

4. Constraints Related to Taxation

Indian service providers on short-term contracts have to pay social security taxes without being able to avail of their contributions. The social security tax liability in most countries is very high (30% or more in some countries), and the incidence of this tax is split between employees and the firms. This is a double burden on companies since they not only pay a part of these contributions but also provide insurance packages to their employees.

An analysis of the PF scheme in India and insurance coverage provided to employees by Indian companies suggests that their coverage is broadly similar to that provided by social security schemes in the EU. The following table provides a comparison with Belgium and Germany.

¹⁶ This parameter considers transparency of transactions, possibility of shareholders' suits, and investor protection index in range of 0-10; higher values indicate greater disclosure, greater liability of directors, greater powers of shareholders to challenge the transaction, and better investor protection.

Table A 6: Comparison of Social Security Systems in selected EU countries and India's PF scheme

GAPS			
Extra			
Matches			
	Belgium	Germany	India
How to get SSN	For employment in Belgium, employer should ensure employees are covered by SSN scheme. You need to join a Mutual health insurance fund of your choice. Free to change this MF.	As soon as you take up employment, your employer will take the necessary steps to register you for social security. You will first be registered with the sickness insurance fund, pension and unemployment insurance. You have to pay contributions for sickness, nursing-care, unemployment and pension insurance. The insurance institutions have set up liaison bodies for dealings in the field of social security with the other EU Member States	As per Employees' Provident Fund Scheme (EPF), both the employees and employer contribute to the fund at the rate of 12% of the basic wages, dearness allowance and retaining allowance, if any, payable to employees per month. The EPF scheme takes care of following needs of the members: (i) Retirement (ii) Medical Care (iii) Housing (iv) Family obligation (v) Education of children (vi) Financing insurance policies
Employee Contribution	You have to pay a social-security contribution, which is a percentage of your wage or salary. Your employer deducts it from your wage or salary and pays it to the national	The amount of your contribution is a certain percentage of earnings. Half the contribution has to be paid by employee and half by employer.	Employee and Employer contribution is equal which is 12% of the Basic + DA. Following are exceptions: If Employer has <20 members or sick industrial company

	office of social security		or manufactures a) jute (b) bread (d) coir and (e) guar gum industries.
Sickness and maternity	<p>HEALTH INSURANCE BENEFITS IN KIND</p> <p>*Medical and dental treatment: [Pay fees to doctor- all reimbursed, Fund reimburses 60-70% which provides list of hospitals]</p> <p>*Pharmaceutical products [only that part of the price of a medicine which is not reimbursed by the health insurance fund]</p> <p>*Hospitalization [First apply to your health-insurance fund [except emergency] pay a small fixed amount towards the cost of each day]</p> <p>*Physiotherapy and nursing care [Reimbursed if prescribed by doctor 60%-75%.]</p> <p>SICKNESS BENEFITS IN CASH</p> <p>If you cannot work because of illness, during the 1 yr entitled to a cash benefit equal to 60 % of your salary [with some qualifying</p>	<p>HEALTH BENEFITS IN KIND</p> <p>*Preventive examinations: [For early detection]</p> <p>*Medical treatment: [If insured self and family to treatment by general practitioners, specialists and dentists.-show insurance card]</p> <p>*Medicines, aids and appliances: [Medicines are available on prescription from a sickness fund doctor and can be obtained from all pharmacies. You pay min fee]</p> <p>*Dental treatment: Pay 20%-50 % of the approved rates</p> <p>*Hospital treatment: Entitled to any form of hospital treatment plus small fee.</p> <p>*Travel expenses</p> <p>CASH SICKNESS BENEFIT</p> <p>If you are unfit for work as a result of illness; employer continue to pay your salary during the first six weeks of incapacity for work. Sick persons who are no longer</p>	<p>HEALTH BENEFITS IN KIND</p> <p>*Advance from the fund for illness, viz., hospitalization for more than a month, major surgical operation or suffering from TB, leprosy, paralysis, cancer, heart ailment etc.</p> <p>Eligibility: hospitalization for a month, medical certificate. You get 6 mth Basic+DA</p> <p>GAP</p> <p>(1) Only advance on the fund is given</p> <p>(2) Dental, pharmaceutical, physiotherapy& nursing care,</p> <p>(3) Hospital treatment for < 1 month hospitalization not considered.</p> <p>(4) Medicines and aids/ appliances not considered. Travel expense not considered</p>

	conditions] MATERNITY BENEFITS 15 weeks leave allowed [82% of paid given].	paid by their employer are entitled to cash benefit by sickness fund MATERNITY BENEFITS All women entitled to health benefits in kind are also entitled to health benefits	
Accidents at work and occupational illnesses	ACCIDENTS AT WORK Employer must take out a policy for his employees with insurance company The following benefits may be claimed: — cash benefits for temporary and/or permanent, partial and/or total incapacity for work — health care, hospitalization and prostheses; — traveling expenses; — special benefits on death. These benefits may be paid in another EU Member State. OCCUPATIONAL ILLNESS - same	The accident insurance scheme covers you while at work or while traveling to or from work. All persons who are employed under an employment contract are subject to compulsory accident insurance. Benefits: first aid and curative treatment; injury benefit; injury pension; Vocational assistance; Death grant	GAP (1) Nothing is considered though some establishments sign up for ESI Scheme which covers occupational illness and accidents
Old age Pensions	Everyone who has been employed in Belgium under an employment contract is covered by old-age insurance. Benefits-retirement	All manual workers, salaried employees and trainees covered by compulsory pension insurance are insured against invalidity. The	Form 19 69(a) Retirement after attaining 55 years of age, you can get the funds contributed

	pension, heating allowance-miners, holiday allowance	amount of your pension will depend on the amount of social-security contributions paid.	
Invalidity	If you have been receiving cash sickness benefit for a year and you are still unable to resume work, you may claim an invalidity allowance. This benefit is payable until you reach retirement age	All manual workers, salaried employees and trainees covered by compulsory pension insurance are insured against invalidity. Cover for : Pension for general invalidity, Pension for occupational invalidity, Additional income, Special rules for miners, Rehabilitation measures	Form 19 69(b) Retirement on account of total and permanent incapacity due to bodily or mental infirmity. 68N: Advance issued To Physically Handicapped member for purchase of equipment required to minimize the hardship on account of handicap.
Death grants and survivors' benefits	Benefits: survivor gets pension-surviving spouse amounts to 80 % of the retirement pension	Where death has occurred as the result of an accident at work or an occupational disease, a death grant is paid. Orphan's pension, Qualifying periods	Form 20 pays the benefit to the nominee as declared. Immediate settlement
Unemployment	Wage and salary earners are insured against the risk of unemployment, regardless of their daily or weekly working hours.	All employed persons including trainees are covered by the unemployment insurance scheme. It also has cash benefits: unemployment benefit, unemployment assistance	69(1)(d) Termination of service on retrenchment 69(1)(dd). Termination on V.R.S. - immediate settlement within 2 months
Family benefits	Entitled to family benefits if you are working as an employed person or if you are	Every person living in Germany is entitled to child benefit and child-rearing allowance	GAP (1) No special benefit to employees in EPF. Although individual

	unemployed, disabled or retired.	for his or her children.[up to age 18]	companies sign up for individual insurances for family.
Housing			Every contributor can take advance on PF amounting to 12-36 months for following: (1) The purchase of site for construction of house (2) The Construction of House (3) The purchase of dwelling flat (4) Additions, alterations or improvements to the dwelling house. Eligibility : Minimum 5-year contribution, Form 31
Marriage and Education			Marriage Advances: 68K (1) Allowed advance from the fund for marriage of self/ son/ daughter/ sister/brother etc. (2) Allowed advance from the fund for education of son/daughter Eligibility: 7 years membership, 50% contribution can be taken.

Source: Based on Khare and Gandhi (September 2007).

An examination of the social security scheme in the UK provides similar insights. The gaps again pertain to unemployment benefits, accidents at work and occupational illness, and family benefits. The UK's social security system has contributory benefits (benefits that depend on payments of National Insurance contributions), non-contributory benefits (which do not depend on payments of National insurance

contribution such as child benefits and invalid care allowance), and means tested benefits (where the amount paid depends on the needs of the claimant and take the form of income support).¹⁷ The Indian PF scheme does not cover non-contributory and income support related benefits.

The table below shows that some benefits, such as those relating to accidents at work or family benefits, are not provided in the Indian PF scheme, but are covered under supplementary pension schemes such as the ESI and employee insurance schemes (by TATA AIG/Bajaj Allianz, etc). The table also shows that the Indian scheme provides certain benefits which are not present in the social security schemes. Thus, there is ground for equivalence and exemption of short-term employees from social security tax liabilities in the EU under totalization agreements (discussed in the section on strategies).

Table A 7: India’s ESI scheme

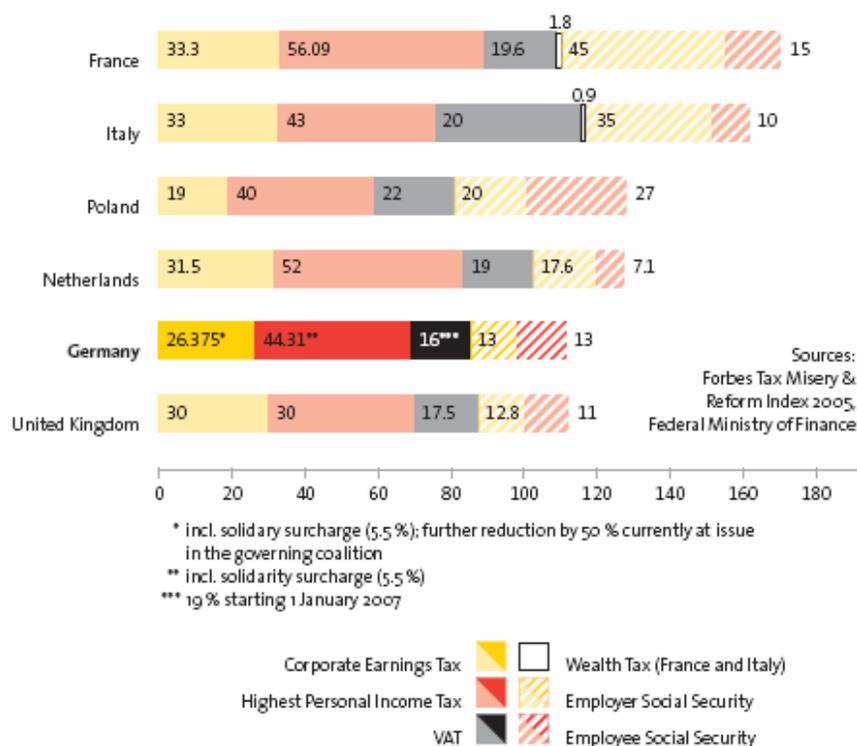
1	ESI Scheme provides the following major Social Security benefits to insured persons.	
	Medical Benefit	* Treatment to family members * Treatment at outstations * Re-entitlement * Change in dispensary
	Maternity Benefit	
	Dependant Benefit	
	Sickness Benefit	
	Disablement Benefit	
	Funeral Expenses	
2	All companies before sending their employees to EU countries also insure them for various Sickness / Hospitality / Accident at Occupation and otherwise, e.g., Tata AIG, Bajaj Insurance [Travel Companion]	

Source: Based on Khare and Gandhi (September 2007).

The following figure shows that high taxes are a major contributor to the costs of doing business in the EU. These taxes include social security, corporate earnings, personal income, value added, and wealth taxes.

¹⁷<http://www.hmrc.gov.uk/manuals/senew/se76000.htm>, <http://www2.rgu.ac.uk/publicpolicy/introduction/socialsecurity.htm>

Figure A 1: Tax and Social Security burdens of selected EU countries, 2004



Source: Reproduced from Khare and Gandhi (2007) based on information from Deutsche Bundesbank.

The following table shows the high tax rates and transactions costs in terms of time and number of payments for selected EU countries.

Table A 8: Tax rates and transaction costs in selected EU countries

Paying Taxes	UK	Sweden	Germany
Payments (number)	7	5	32
Time (hours)	105	122	105
Profit tax (%)	20.5	18.5	24.7
Labor tax and contributions (%)	10.5	38	22.3
Other taxes (%)	4.4	0.6	10.1
Total tax rate (% profit)	35.4	57	57.1

Source: World Bank (2007). <http://www.doingbusiness.org/economyrankings/?regionid=0>

Procedural issues related to bookkeeping and auditing requirements are also seen as unnecessarily stringent. For instance, differences in financial year, cutoff dates for payroll processing across EU countries, and duration of stay that is exempt from income tax payments lead to double taxation when an IT company moves a service provider across different EU countries.

Another issue is taxes on offshore earnings of companies, the attribution of revenue, and allocation of expenses given a globally-distributed delivery model, frequent employee movement, difficulties in determining residency status of employees, and the need to provide benefits to mobile employees.

5. Constraints Related to Labor Market Regulations

The main constraints in the EU include local employment conditions, labor market tests, and rigid labor laws. Some EU countries have a local staffing rule (e.g., Ireland has a 50% local staffing rule), which imposes additional costs on companies and prevents them from using their ideal mix of local and overseas resources. Labor market tests impose costs as they delay the deployment of resources, especially when there is a clear shortage of skills. Several EU countries have rigid labor laws regarding layoffs, unemployment compensation, and maximum working hours which may not be conducive to the normal billing cycle of IT companies.

The following table shows the variability across selected member countries in terms of labor market rigidities and associated costs of hiring and firing. It shows that labor laws are an important impediment to doing business in the EU.

Table A 9: Employing workers¹⁸

Employing Workers	UK	Sweden	Germany
Difficulty of Hiring Index	11	28	33
Rigidity of Employment Index	14	43	44
Non-wage labor cost (% of salary)	11	32.7	19.3
Firing costs (weeks of wages)	22.1	26	69.3

Source: World Bank (2007), <http://www.doingbusiness.org/economyrankings/?regionid=0>

¹⁸ This refers to the rigidity of labor laws and difficulties in hiring and firing as well as labor costs. The higher the index, the more rigid is the labor market. The index range is from 0-100 with 100 being the most rigid.

Appendix C

The Blue Card Concept in the European Union

The European Commission is looking at a range of immigration reforms to deal with Europe's severe shortage of workers. As part of efforts to fulfill Europe's need for highly-qualified workers, Brussels is deliberating upon the issue of an EU-wide work permit that allows employment to non-Europeans in any country within the 27-nation bloc. This is the idea of an EU work permit – or the 'blue card'.

The EC Green Paper on economic migration of third-country nationals between countries that are part of the European Union makes a comprehensive case for adopting common grounds for admission of third-country nationals who have received a work permit for any member country. Article 63(3) of the EC Treaty provides that the Council is to adopt "measures on immigration policy within the following areas: **conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits**". Since the Tampere European Council of October 1999, the Commission has already sought to launch an in-depth discussion on a strategic project on economic migration. In 2001 the Commission adopted a proposal for a Directive dealing with the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

At the political level, the Thessaloniki European Council of 19-20 July 2003 stressed "**the need to explore legal means for third country nationals to migrate to the Union, taking into account the reception capacities of the Member States.**" Meanwhile, recognizing the impact of demographic decline and ageing on the economy, the Commission highlighted the need to review **immigration policies for the longer term** particularly in light of the implications which an economic migration strategy would have on competitiveness and, therefore, on the fulfillment of the Lisbon objectives. This trend in society has encouraged the debate on migration to the EU, while not impinging on the responsibility of Member States to decide on the numbers of immigrants to be admitted. Between 2010 and 2030, at current immigration flows, the decline in the EU-25's working age population will entail a fall in the number of employed people of some 20 million. Such developments will have a huge impact on overall economic growth, the functioning of the internal market and the competitiveness of EU enterprises.

While individual countries must have a say in determining the volumes of admission of third-country nationals from other EU countries, their decisions will have a significant bearing on the EU labor market as a whole. In the interest of the prosperity of the European region, there is a clear case for more transparent and harmonized common rules and criteria at the EU level for admitting economic migrants. In addition, any adopted measure should minimize the administrative burden for Member States and third-country nationals.

The EU proposal aims to do away with different and complex procedures across member countries and thus facilitate entry by skilled overseas workers into the EU. Foreign talent would be allowed to live in an EU country for two years and the application process would be completed within three months. The blue card would

provide for intra-EU mobility as long as the immigrant workers have a work contract and demand for their skills in that labor market. This proposal and the introduction of a blue card could benefit Indian IT professionals as it would address their concerns about the widely varying immigration procedures and timelines across EU member countries and the current problems with intra-EU mobility. This proposal is subject to debate and discussion among the EU member countries and would need the approval of all Member States and of the European Parliament. It could take two to three years to materialize, but could have positive implications for the Indian IT industry.

Note: Based on the discussion on “Blue Card” in Panda and Prakash, September 2007.

Appendix D

HR 888

To provide for the admission to the United States of nonimmigrant business facilitation visitors.

IN THE HOUSE OF REPRESENTATIVES **February 7, 2007**

This is a bill which provides for the admission to the United States of nonimmigrant business facilitation visitors.

SECTION 1: SHORT TITLE.

This Act may be cited as the 'Business Travel Facilitation Act of 2007'.

SECTION 2: BUSINESS FACILITATION VISITORS.

Section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) is amended by adding at the end the following new subsection:

Business Facilitation Visitors-

- (1) **IN GENERAL-** For purposes of section 101(a)(15)(B), the term 'visiting the United States temporarily for business' includes visiting the United States temporarily as a business facilitation visitor, as defined in paragraph (2).
- (2) **DEFINITION OF BUSINESS FACILITATION VISITOR-** For purposes of this subsection, a business facilitation visitor is an alien who is visiting the United States temporarily to--
 - (A) provide services pursuant to a qualifying services contract, as defined in paragraph (7); or
 - (B) with respect to personnel of a United States entity--
 - (i) to provide management or technical training to such personnel; or
 - (ii) to receive management or technical training from such personnel.
- (3) **CONDITIONS-**
 - (A) **IN GENERAL-** No alien may be admitted or provided status as a business facilitation visitor unless—
 - (i) the alien is a national of a country that the Secretary of Homeland Security has certified as having entered into arrangements with the United States to combat fraud in the application for visas to the United States through the use of measures such as machine readable passports and biometric technology; and

(ii) the consular officer to whom the alien applies for a visa under the provisions of section 101(a)(15)(B) determines, based on evidence provided by the alien, that the conditions described in this paragraph have been met.

(B) CONDITIONS WITH RESPECT TO PROVISION OF SERVICES- In the case of the provision of services as described in paragraph (2)(A), the conditions described in this paragraph are that—

(i) all of the alien's remuneration and expenses related to the provision of such services will be paid by the alien's employer; and

(ii) the alien is qualified to provide such services, as demonstrated by the alien's possession of--

- expert knowledge of the entity's technology or operations on the basis of technical training or experience; and
- all licenses or other authorizations required to provide the services in the United States.

(C) CONDITIONS WITH RESPECT TO PROVISION OR RECEIPT OF MANAGEMENT OR TECHNICAL TRAINING- In the case of the provision or receipt of management or technical training as described in paragraph (2)(B), the conditions described in this paragraph are that --

(i) the alien is an employee of a firm, corporation, or other legal entity that--

- is affiliated through ownership or control with the United States entity whose personnel will be providing or receiving the training;
- has entered into a joint venture or similar agreement with the United States entity; or
- has purchased, or is considering purchasing, goods or services from, or has sold goods or services to, the United States entity, and the training is related to such purchase or sale;

(ii) all of the alien's remuneration and expenses related to the provision or receipt of such training will be paid by the alien's employer;

(iii) in the case of an alien seeking to provide management training, the alien has-

- at least five years of experience directly related to management or management training; and

- detailed knowledge of the business operations of the alien's employer; and
 - (iv) in the case of an alien seeking to receive management training, the alien holds, or will hold within one year of completing the training, a management level position within the alien's employer.
- (4) PERIOD OF AUTHORIZED ADMISSION-
- (A) BUSINESS FACILITATION VISITORS PROVIDING SERVICES- The period of authorized admission for an alien admitted as a business facilitation visitor providing professional services as described in paragraph (2)(A) shall not exceed one year. However, the Secretary of Homeland Security may grant such alien a single extension of not more than six months if the Secretary determines, based on evidence provided by the alien, that--
 - (i) there has been an unforeseen delay in completing the provision of services described in the qualifying services contract; and
 - (ii) replacing the alien with another provider of professional services would further delay or otherwise inhibit fulfillment of the terms of the contract.
 - (B) BUSINESS FACILITATION VISITORS PROVIDING OR RECEIVING MANAGEMENT OR TECHNICAL TRAINING- The period of authorized admission for an alien admitted as a business facilitation visitor providing or receiving management or technical training, as described in paragraph (2)(B), may not exceed one year.
- (5) NO CHANGE OF STATUS- Notwithstanding any other provision of this Act, an alien admitted as a business facilitation visitor shall not be eligible for a change of nonimmigrant status or for an adjustment from nonimmigrant to immigrant status during the alien's stay in the United States.
- (6) AUTHORIZATION TO COUNTER PATTERN OF FRAUD- If the Secretary of Homeland Security finds that nationals of a country have engaged in a pattern of fraud involving visa applications or other immigration matters, the Secretary may prohibit such nationals from admission to the United States as business facilitation visitors for such period of time as the Secretary determines to be appropriate.
- (7) DEFINITION OF QUALIFYING SERVICES CONTRACT- For purposes of this subsection, a qualifying services contract is a contract between a foreign provider of professional services and a United States entity, the terms of which include--
- (A) the time period during which the alien will be required to be present in the United States in order to fulfill the terms of the contract;

- (B) the duties to be performed by the alien in the United States;
- (C) provisions stating that—
 - (i) the alien's remuneration and expenses will be paid by the foreign provider;
 - (ii) the United States entity will provide the alien with working conditions comparable to those of similarly situated providers of professional services to the entity and consistent with the applicable requirements of the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.); and
 - (iii) the alien possesses the credentials necessary to provide the services covered by the contract, including any licenses or other authorizations required to provide the services in the United States; and
- (D) a provision stating the respective responsibilities of the foreign provider for ensuring the alien's—
 - (i) compliance with the terms of the alien's admission to the United States; and
 - (ii) return to the alien's home country at the conclusion of the period for which the alien is admitted.

Appendix E

Taxes & Benefits

A gap analysis was done between the social security systems of Belgium, Netherlands, Germany, and Finland with India's PF scheme. Belgium, Germany and the Netherlands are countries with which India is considering signing totalization agreements. The inclusion of Finland provides a Nordic perspective as the Nordic countries have very generous social security systems. The various heads for this comparison of schemes are How to get enrolled for SSN, Employee contribution, Sickness & Maternity, Old Age pensions, Invalidity, Death grants, Unemployment and other supplementary benefits. The detailed comparative analysis is shown in the following table

Table A 10: Comparison of India's PF scheme with Social Security Systems of Selected EU Member Countries

	Belgium	Germany	Netherland	Finland	India
How to Get SSN	For Employment in Belgium Employer should ensure you are covered by SSN scheme. You need to join a Mutual Health insurances fund of your choice fee to chance this MF.	As soon as you have taken up employment your employer will take the necessary steps to register you for social security. You will first be registered with the sickness insurance fund pension and unemployment insurance. You have to pay contribution for sickness nursing care unemployment and pension insurance. The insurance institutions have set up liaison bodies for dealings in the field of social security with the other EU Members State.	Netherland SSN covers : Sickness and Maternity Invalidity Old age Survivors Benefits Unemployment Child Benefit As soon as you start working in Netherland you insured for SSN [automatically covered expect for Health in which you choose your fund]	All persons permanently resident in Finalnd are entitled to social security. The Ministry of Social Affairs and Health is responsible for Social security legislation and general development of the social security system. It covers - Health are and the health insurance - Occupational accidents and diseases - Rehabilitation - Statutory pension schemes - Unemployment benefits - Parental and Survivor's benefits	As per EPF Scheme both the employees and employer contribute to the fund at the rate of 12% of the basic wages dearness allowance and retaining allowance if any payable to employees per month. Employees' Provident Fund Scheme takes care of following need of the members: (i) Retirement (ii) Medical Care (iii) Housing (iv) Family obligation (v) Education of children (vi) Financing of Insurance Policies
Employee Contribution	You have to pay a social security contribution which is a percentage of your wage of salary. Your employees deducts it from your wage or salary and pays it to the national office of social security.	The amount of your contributions is certain percentage of earnings. Half of the contributions has to be paid by employee and half by employer.	Employer pays the contribution due under the various laws on SSN Employee contribution is deducted from salary. Insurance institution may in some cases deducted insurance contributions from these SSN benefits.	Social-Security benefits are financed through social security contributions collected from employers, employees and insured persons as well as the State and local authorities' share.	Employee and Employer contribution is equal which is 12% of the Basic + DA Following are exceptions. If Employer has <20 members or sick industrial company or manufacturer (a) Jute (b) Breed (c) Coir and (d) Guar gum Industries
Sickness ad Maternity	HEALTH INSURANCES BENEFITS IN KIND ● Medical and dental treatment (Pay fees to doctor all reimbursed)	HEALTH BENEFITS IN KIND ● Preventative examination : [For early detection] ● Medical	BENEFITS IN KIND ● Specialist medical care : [In the lowest accommodation category, nursing care, auxiliary	PUBLIC HEALTH CARE SERVICE All persons residing in Finland are entitled to basis health care and hospital services. Health center charge. Health center fee	HEALTH BENEFIT IN KINDS Advance from the fund for illness viz. hospitalization for more that a month major surgical operation or suffering



	Belgium	Germany	Netherland	Finland	India
	<p>fund reimburses 60-70% which provides list of hospitals)</p> <ul style="list-style-type: none"> • Pharmaceutical products (Only that part of the price of medicine which is not reimbursed by the health insurance fund) • Hospitalization [First apply to your health insurance fund [except emergency] pay a small fixed amount towards the cost of each day] • Physiotherapy and nursing care [Reimbursed if prescribed by doctor 60-75%] <p>SICKNESS BENEFITS IN CASH</p> <p>If you cannot work because of illness during the one year entitled to a cash benefits equal to 60% of your salary with some qualifying conditions.</p> <p>MATERNITY BENEFITS : 15 weeks leave allowed (82% of paid given).</p>	<p>treatment : [If insured self and family to treatment by general practitioners specialists and dentists show insurance card]</p> <ul style="list-style-type: none"> • Medicines, aids and appliances : [Medicines are available on prescription from a sickness fund doctor and can be obtained from all pharmacies you pay min fee] • Dental treatment: Pay 20% -50% of approved rates. • Hospital treatment : entitled to ant form of hospital treatment plus small fee. • Travel expenses <p>CASH SICKNESS BENEFIT</p> <p>If you are unfit for work as a result of illness : employer continue to pay your salary during the first six weeks of incapacity for work Sick persons who are no longer paid by their employer are entitled to cash benefits by sickness fund</p> <p>MATERNITY BENEFITS</p> <p>All women entitled to health benefits in kind are also entitled to health benefits</p>	<p>care, paramedical assistance or medication.]</p> <ul style="list-style-type: none"> • Obstetric assistance • Medication : Drugs & foodstuffs for medical use and bandages dressings. • Transport of sick person • Care for mother and child • Can avail Benefits in insurance expires or even if you leave Netherland and settle in other EU State [within one month] <p>MATERNITY BENEFITS IN CASH & KIND</p> <p>During your 16 week maternity leave you are entitled to receive benefit equal to 100% of your salary from the benefits agency to which your employer is affiliated</p>	<p>HEALTH BENEFITS IN KIND</p> <ul style="list-style-type: none"> • Doctor fees examination and treatment [60-75% reimbursement of doctor fees medical examination and treatment costs.] • Medicines basic creams and clinical • Nutritive preparations [in part of full] • Compensation for travel costs • Sickness allowance 	<p>from TB, Leprosy Paralysis, Cancer, Hearth , ailment, etc.</p> <p>Eligibility : hospitalization for a month medical certificate. You get 6 month Basic+DA</p> <p>GAP</p> <ol style="list-style-type: none"> 1 Only advance on the fund is given 2 Dental Pharmaceutical Physiotherapy Nursing care, 3 Hospital treatment for 1 month hospitalization not considered, 4 Medicines (Drugs, foodstuffs, bandages) and aids appliance not considered. Travel expense not considered
<p>Accidents at work and occupational illnesses</p>	<p>ACCIDENT AT WORK employer must take out a policy for his employees with insurance company The following benefits may be claimed</p> <ul style="list-style-type: none"> - Cash benefits for temporary and/or permanent partial and/or total incapacity for work - health care hospitalization and prostheses - traveling expenses - special benefits on death <p>These benefits may be paid in another EU Member State</p> <p>OCCUPATIONAL ILLNESS - Same</p>	<p>The accident insurance scheme covers you while at work or while traveling to or from work. All persons who are employed under an employment contract are subject to compulsory accident insurance.</p> <p>Benefits :</p> <p>First aid and curative treatment; Injury benefit; Injury pension; Vocational assistance; Death grant</p>	<p>There is no separate insurance scheme in the Netherlands for accidents at work and occupational diseases. If you are incapable of working as a result of an accident at work or an occupational disease the rules on sickness apply.</p>	<p>Accident insurance entitles the employee to compensation for financial loss caused by an accident at work of an occupational disease. Employers have an obligation to insure their employees. The insurance covers accidents at work and occupational diseases.</p>	<p>GAP :</p> <p>(1) Nothing is considered though some establishments sign up for ESI Scheme which covers</p>



	Belgium	Germany	Netherland	Finland	India
Old Age Pensions	Everyone who has been employed in Belgium under an employment contracts covered by old-age insurance Benefits – retirement pension hearing allowing miners holiday allowance	All manual workers salaried employees and trainees covered by compulsory pension insurance are insured against invalidity. The amount of your pension will depend on the amount on social security contributions paid.	Person living or working in the Netherland are insured under the General Old-Age Pensions Act after age of 65. The pensions is paid monthly. A yearly holidays allowance paid in May. Paid even if you are in other EU members state	The Finnish statutory pension system consists of an employment pension and national pension invalidity unemployment survivors and old-age pensions are benefits under these schemes. An invalidity pension is paid to an employed or self-employed person of under 65 whose ability or work has been impaired because of illness defect or injury. Old age pension : A person resident in Finland or another member State who has reached the age of 65 is entitled to an old age pension under the national pension scheme. A widow/widower is entitled to a survivor's pension	Form 19 63(a) Retirement after acclaming 55 years of age you an get the Funds contributed
Invalidity	If you have been received case sickness benefit for a year and you are still unable to resume work you may claim an invalidity allowance. This benefit is payable until you reach retirement age.	All manual workers salaried employees and trainees covered by compulsory pension insurance are insured against invalidity Cover for : Pension for general invalidity, Pension for occupational invalidity, Additional income, Special rules for miners, Rehabilitation on measures	After availing 52 week sickness disablement is such that you are still incapable of working. Employer provides benefits of 14% - 70% - 100% of your last salary you receive the depends on the degree of your incapacity. If you become disabled when you are no longer insured in the Netherland you still get benefits.		Form 19 63(b) Retirement on account of total and permanent incapacity due to bodily or mental infinity S8N Advance issued To Physically Handicapped member for purchase of an equipment required on minimize the hardship on account of handicap
Death grants and survivors benefits	Benefits survivor gets pension surviving spouse amounts to 80% of the retirement pension.	Where death has occurred as the result of accident at work or an occupational disease a death grant is paid Orphan pension, qualifying periods.	As long as you are living or working in the Netherlands you are covered by the Dutch survivors insurance scheme. Death of a person who is no longer covered by insurance still gets benefits		Form 20 pays the benefit to the nominee as declared immediate settlement
Unemployment	Wage and salary earners are insured against the risk of unemployment regardless of their daily or weekly working hours.	All employed persons including trainees are powered by the unemployment: insurance scheme. It also has cash benefits: unemployment benefit, unemployment, assistance.	If you become unemployed in the Netherlands through no fault of your own-entitled to unemployment benefit : <ul style="list-style-type: none"> • Earnings-related benefit for a max 5 years, • Continuation for a max 2 years, • Short term benefit for six months 	An unemployment benefits is paid by the social insurance institution either in the form of a basic daily allowance [EUR 2052 (HM 122) in 2000 or by an unemployment fund in the form of earnings related allowance. PARENTAL BENEFITS Mothers are entitled to maternity and parental allowance and fathers to paternity and parents allowance	69(1d) Terminator of service on entrenchment 69 (1) (dd) Termination on % RS immediate settlement within 2 months



	Belgium	Germany	Netherland	Finland	India
				<p>provided that they have been covered by social security legislation in Finland</p> <p>CHILD ALLOWANCE</p> <p>In 2000 he monthly child allowance for one child in EUR 89.98 for the second EUR 110.50 and so on The child allowance is a tax free benefit.</p>	
Family benefits	Entitled to family benefits if you are working as an employed person or if you are unemployed disabled or retired.	Every person living in Germany is entitled to child benefit and child rearing allowance for her children up to age 18.]	If you live or work in the Netherlands you are normally entitled to child benefits from the first child onwards.		<p>GAP:</p> <p>(1) Nothing special benefit to employees in GPF Although individual companies sign up for individual insurance for family</p> <p>(2) Child allowance and parental benefits missing</p>
Housing					<p>Every contributor can take advance of PF amounting to 12-36 months for following:</p> <p>(1) The purchase of site for construction of house</p> <p>(2) The construction of House</p> <p>(3) The purchase of dwelling flat</p> <p>(4) Additions Alterations or improvements to the dwelling house</p> <p>Eligibility: Minimum 5 year contribution form 31</p>
Marriage					<p>(1) Allowed Advance from the fund for marriage of self/son/daughter/sister/brother etc.</p> <p>(2) Allowed Advance from the fund for education of Son/Daughter</p> <p>Eligibility: 7 years membership 50% contribution can be taken</p>
Supplementary Pensions Schemes for employed persons			If you are working in the Netherland you may be covered by a supplementary pensions scheme depending on Employer.		ESI option / Employers have different plans like Bajaj Allianz Insurance

Source: Reproduced from Khare and Gandhi (September 2007)

Appendix F

Advance Tax Ruling and Advance Pricing Agreement

An Advance Tax Ruling is an agreement on the tax characterization of international corporate structures, such as advance certainty on the application of the participation exemption.

The Dutch advance tax ruling practice

An advance tax ruling is an agreement between the Dutch tax authorities and the taxpayer about the application of Dutch tax law regarding (future) transactions, investments or corporate structures, i.e., it determines the profit the tax payer should generate for its activities in the Netherlands. For the taxpayer for who taxation may be a significant factor to decide on a possible location, the advantage is that it is possible to obtain clarity and certainty in advance, thus before the actual activities are started up or the structure is established.

Under this old ruling policy (abolished in 2001; see below), mainly passive finance and royalty companies were located in the Netherlands (so called flow-through companies) with little substance, and in many cases no or very low business risks. Under this old ruling policy the arm's length remuneration was determined as a fixed margin: for instance, for financing as a percentage (spread) of the average funds on lent per annum and for royalties a percentage of net royalties received.

This old ruling policy was replaced by a new policy in 2001, an Advance Pricing Agreement ("APA") and Advance Tax Ruling ("ATR") practice. The new ruling practice contains new elements, but most of it is in fact a codification of already existing but not yet legalized practice. The policy also prescribes the procedure for obtaining rulings.

The main changes relate to so-called "Financial Services Companies", which include finance companies and royalty companies. Under the current ruling policy structures that do not have real substance in The Netherlands (substance requirements), such a pure flow through royalty structures, are in essence no longer eligible for a ruling, unless they agree in advance with certain exchange of information procedures with other countries. Rulings can however still be obtained for royalty and finance companies provided that the Dutch company meets substance requirements of both an operational and economical nature.

The substance requirements do not apply to holding companies, so that it is still possible to set up a Dutch holding company with low substance in the Netherlands. See also International tax planning - The Dutch holding company. Depending on the intended activities and/ or intended structure you can either obtain an Advance Pricing Agreement or an Advance Tax Ruling.

Advance pricing agreement (APA)

An APA provides certainty in advance regarding transfer-pricing issues.

Typical issues to be governed in APA agreements are the prices which are charged within a group of related companies for services rendered or goods delivered. These kinds of rulings are issued within the scope of Dutch transfer pricing principles.

An APA request can, in principle, cover all transfer-pricing issues of a taxpayer or may be limited to specific associated enterprises or to specific transactions. This may be an important feature when deciding to conduct actual business in The Netherlands.

For example, the goods one intends to sell on the Dutch market are manufactured in your home country and one wonders what remuneration a Dutch subsidiary should receive for its sales and marketing activities. In line with sound business practice, a company operating in the Netherlands is considered to aim for added value and as such should report a proper remuneration in relation to the activities it performs. Even when the activities performed are of an auxiliary or supportive nature, the Dutch company is required to report a minimum margin. In essence, the Dutch subsidiary should receive an arm's length remuneration for the services and or activities it performs.

One can basically only obtain an APA if you are able to demonstrate that the transfer prices you use or intend to use are consistent with the arm's length principle, which in general means that the conditions of transactions between group companies are comparable with conditions of transactions conducted by unrelated companies. As stipulated before, each and every company involved should receive a remuneration that is a reflection of the functions performed, taking into account the assets used and the risks assumed.

The arm's length principle as incorporated in Dutch tax law and concrete guidelines are given in policy. For more information about the Dutch transfer pricing principles we refer to the publication of the Dutch Ministry of finance: Transfer prices, the application of the arm's length principle and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines), Decree of 30 March 2001.

When filing the APA request it should not only include information on the transactions, products, business or arrangements that need to be covered but also which parties will be involved, information about the world-wide organisational structures and last but not least a description of the proposed transfer pricing methodology.

In principle one is free to choose the most suitable transfer pricing method provided that the method chosen leads to an arm's length remuneration for the specific transactions or activities for which certainty in advance has been requested and one will be able to support the method chosen. Other information to be provided concerns amongst others a critical assumption upon which the methodology or price is based, a general description of the market conditions and the accounting periods to be covered.

Appendix G

Apostille Convention

This 1961 Hague Convention abolishes the requirement of diplomatic and consular legalization for public documents originating in one Convention country and intended for use in another. Documents issued in a Convention country which have been certified by a Convention Apostille are entitled to recognition in any other Convention country without any further authentication. Consular officers in Convention countries are prohibited from placing a certification over the Apostille Convention.

The convention specifies the modalities through which a document issued in one of the signatory countries can be certified for legal purposes in all the other signatory states. Such a certification is called an apostille. It is an international certification comparable to a notarization and is often added to documents that have been in some manner signed by a Notary, lawyer or other public official such as the clerk of a court of record in their official capacity.

States which have not signed the Convention must specify how foreign legal documents can be certified for its use. Sometimes two countries may have a special treaty concerning the recognition of each other's documents, but usually this is not the case. When the country issuing or receiving the document does not recognize an apostille, one must usually take the document to the consulate of the concerned foreign country or to an honorary consular appointed by that country that is qualified to certify it. It may need to be certified by the highest government official in the country where it originated, such as the Secretary of State or Minister of Foreign Affairs, before being accepted by the consular officer of the foreign country; this process is known as chain authentication as an unbroken chain of government officials each certifies the signature (and seal in some cases) of the prior official in the first country and the consular officer then certifies that the document should be recognized as authentic in the country of destination. Usually that consular officer's signature can be authenticated in the country of destination as well.

