

Mr. Peter Altmaier  
German Federal Minister for  
Economic Affairs and Energy  
European Council - German Presidency  
11019 Berlin  
GERMANY

Brussels, 18 September 2020

Subject:       **ESF Position on EU Proposal for a Revised Enforcement Regulation**

Dear Minister,

The European Services Forum (ESF) is the European private sector organisation that represents the interests of the European services industries in international trade and investment negotiations. It comprises major European service businesses and European service sector federations covering service sectors including (but not limited to) financial services, telecommunications and IT services, maritime transport, postal and express delivery services, business and professional services, construction, distribution, audio-visual and education services. Our membership is formed, directly or indirectly, of businesses of all sizes and associations from all EU member states. We are committed to actively promoting the liberalisation of international trade and investment in services.

On 12 December 2019, the European Commission adopted a [proposal](#) to amend [Regulation \(EU\) No 654/2014](#) concerning the exercise of the EU's rights for the application and enforcement of international trade rules ('the Enforcement Regulation') of 15 May 2014. The EU Council adopted its negotiating position on 8 April 2020. The Committee on International Trade (INTA) of the European Parliament adopted its [negotiating position](#) on 6 July 2020. We understand that the trilogue negotiations between the three institutions are now launched as the next step in the legislative process, as this regulation is under the co-decision legal basis.

This letter is to provide you, the INTA Committee members, and the European Parliament members, as well as all European institutions, with the views of the European Services Forum on that matter.

## **A. The Context**

The Enforcement Regulation enables the EU to suspend or withdraw concessions or other obligations under international trade agreements in order to respond to breaches by third countries of international trade rules that affect the EU's commercial interests. The proposed amendments would enable the EU to impose counter-measures in situations where EU trade partners violate international trade rules and block the dispute settlement procedures included in multilateral, regional and bilateral trade agreements, thus preventing the EU from obtaining final binding rulings in its favour through a recognised dispute settlement resolution mechanism.

Indeed, the current Regulation of 2014 does not address a situation where the Union has a right of action in response to a measure maintained by a third country (through a positive decision of a WTO panel for instance), but the WTO dispute settlement through adjudication is currently blocked or otherwise not available for reasons of non-cooperation of the third country having adopted that measure.

In the same vein, a similar situation may arise under other international trade agreements, in particular regional or bilateral agreements, where a third country does not cooperate, as necessary, for the dispute settlement to function, for example by failing to appoint an arbitrator and where there is no mechanism foreseen to secure the functioning of dispute settlement in this situation.

In the face of blockage of dispute settlement, the European Union will be unable to enforce international trade agreements. Therefore, the Commission decided to propose an amendment to extend the scope of Regulation (EU) No 654/2014 to such situations.

One central topic in the current discussions is whether the amendment of the Enforcement Regulation should also cover measures in areas other than those which the Regulation currently envisages on trade in goods and government procurement, such as trade in services and trade-related aspects of intellectual property.

It is interesting to recall that in 2014, ESF was already invited to an INTA Hearing on that particular issue about the scope of the possible retaliation/sanction in case of non-application of WTO rules, and we were asked about the possibility of enlarging the scope to the services sectors. At that time, we tried to identify modes or supply or services sectors where such retaliations might be possible. We came to the conclusion that it would be extremely difficult in practice to impose sanctions in any services sectors without compromising EU WTO multilateral commitments, since most EU binding commitments are non-discriminatory. And hence, **most EU regulation in services sectors are applied erga-omnes. So, it will clearly be a challenge to change an EU or EU member state regulation in one sector that would affect only one country's suppliers.** It is indeed difficult to change the financial services regulation, or the telecom regulation, or in any other sector for the services suppliers of one third country only. ESF therefore assessed that the only mode of supply where sanctions would be practically feasible will be on mode 4 (temporary mobility of people), where country specific visa regulation can be taken.

Due to the unclear situation for services and IPR, the EU institutions finally agreed in 2014 to make a review of the situation few years after the implementation of the regulation 654/2014 (*See whereas 9 & 11, and article 10 of the Regulation*). So, the Proposal of the Commission comes in this context, albeit six month later than scheduled in the regulation.

## **B. ESF Views**

ESF understands the desire of the EU institutions to take account of the new reality of the WTO Appellate Body and to be better equipped to defend EU interests. Hence, **ESF is supportive of the European Commission's proposals to strengthen the enforcement regulation.**

This difficulty about how to retaliate in services seems to be well identified by the Commission. In its proposal, the Commission suggests to run a new review of the regulation "*By 1 March 2025 at the latest*" (*see Article 1 (3) a*)) and then proposes that "the Commission shall undertake a review aimed at envisaging under this Regulation additional commercial policy measures suspending concessions or other obligations in the field of trade in services". Interesting to note that the Commission does not even mention intellectual property anymore. ESF supports such an approach.

We would like on the other hand to express some concerns in relation to the European Parliament proposals on adjustments to the EU Enforcement Regulations that, in our view, go well beyond those of the Commission. We consider that, if adopted, the Parliament proposals would possibly significantly change the EU's enforcement tool box.

We are particularly concerned to see the proposal to expand the scope of EU unilateral enforcement powers to include services and intellectual property in the list of possible trade measures the EU can use against a trading partner. The Parliament is right in its assessment that services and intellectual property rights account for a large and growing share of world trade<sup>1</sup> and are covered by international trade agreements, including regional or bilateral Union agreements.

But such statement does not in itself justify that it suddenly becomes possible to retaliate in the services sectors and in the field of intellectual property rights. On our side, we haven't identified any new development compare to 2014 that would allow to appropriately delimit such retaliatory measures that would target one specific country when it comes to services or IPR. It is important to underline that possible restrictions related to mobility of natural business people (*mode 4 of supply*) would cover all economic activities and not only business personnel from services sectors.

The European Services Forum would like therefore **to request, before adopting such an extension, that the Commission and all EU institutions provide some clarifications on what kind of measures they foresee for implementation in the services and IPR, and what impact these could lead to.**

Furthermore, to date trade irritants have been restricted to tariffs on goods. Extending the enforcement powers to services and IP could trigger a further escalation of existing trade disputes by EU trading partners and risks further undermining the WTO multilateral rules system.

The enforcement regulation was being amended by the Commission in a technical sense to reinforce the EU's support for multilateral and rules-based trade. In contrast, we believe that the Parliament proposals could in fact counteract the EU's ambition to lead the reform of the WTO, by leading to unilateral countermeasures that potentially violate WTO commitments and other international agreements such WIPO for trademarks.

Indeed, as for the proposal, where the EU should be able to implement trade measures even without a WTO decision, we see great risks that this might set aside the legal certainty/rule of law. Trying to settle disputes without a dispute settlement system risks undermining rule of law and increase trade tensions.

A rushed expansion of the scope risks worsening the trade war without actually providing the EU with the desired outcome. Should the decision in the trilogue to extend the regulation to services and IPR be taken, ESF urges the EU **to accompany such decision by setting up a proper control mechanism among the EU institutions, with prior consultations of interested stakeholders before triggering any retaliation.**

Trade enforcement is best addressed through a combination of stronger WTO compliant enforcement tools and WTO reform - this has the highest chance of creating a win-win scenario for the EU and its exporting industries' in line with the EU's priorities and in support of an open, rules-based world trading system.

We thank you for taking this position into consideration and remain at your disposal for any further information on this important matter.

Yours sincerely,



Noel Clehane  
ESF Chairman

*PS: This position has also been sent to relevant interlocutors in the EU Parliament and European Commission*

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<sup>1</sup> See ESF Brochure on ["The importance of trade in services: Facts & Figures"](#) June 2019

## LIST OF ESF MEMBERS SUPPORTING THIS POSITION HERE ABOVE

- Amfori
- Apple
- Architects' Council of Europe –ACE
- British Telecom Plc
- BDO
- Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
- BUSINESSEUROPE
- BUSINESSEUROPE WTO Working Group
- BSA The Software Alliance – BSA
- Conseil des barreaux de la Communauté Européenne – CCBE
- Danish Shipping
- Deutsche Post DHL
- DI – Confederation of Danish Industries
- Digital Europe
- EK - Confederation of Finnish Industries
- EuroCommerce
- European Banking Federation - EBF
- European Express Association – EEA
- European Federation of Engineering and Consultancy Associations – EFCA
- European Public Telecom Network – ETNO
- European Satellite Operators Association – ESOA
- European University Association – EUA
- Fédération de l'Industrie Européenne de la Construction – FIEC
- FratiniVergano European Lawyers
- General Council of the Bar of England & Wales
- Google
- HSBC Group
- IBM Europe, Middle East & Africa
- Institute of Chartered Accountants in England and Wales (ICAEW)
- Inmarsat
- Insurance Europe
- Irish Business and Employers' Confederation - IBEC
- Le Groupe La Poste
- Microsoft Corporation Europe
- Oracle Europe, Middle East & Africa
- Orange
- PostEurop
- Prudential Plc.
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- TechUK
- Telenor Group
- TheCityUK
- UPS
- Vodafone
- Zurich Insurance