Brussels, May 2020

ESF Position Paper on WTO JSI on Investment Facilitation for Development

Executive summary:

- European services businesses are major investors across the world, creating economic growth and jobs in the countries they open establishments.
- The lack of transparency and due diligence in the regulatory environment for foreign investors are systematically raised as major trade barriers when European service investors try to open or expand investment in third countries.
- The European Services Forum (ESF) suggests a non-exhaustive list of provisions that should be included in a WTO Investment Facilitation Agreement, with notably provisions on transparency, on the authorisation processes, on the independence of the regulatory bodies and the fight against corruption.
- ESF calls on the largest number of WTO members to adopt the elements that will be included in the Investment Facilitation Agreement and to include them into their own national legislation governing foreign direct investment.
- The European Services Forum calls upon all WTO Members to engage in the coming months in the negotiating phase towards the adoption of WTO Investment Facilitation Framework, if possible by the Twelfth WTO Ministerial Conference whenever it will take place, or at least to register good progress at that Conference and encourage the negotiators to keep the momentum and pursue their talks towards the conclusion of an ambitious framework as early as possible.

The European Services Forum (ESF) represents the interests of European services sectors committed to actively promoting the liberalisation of international trade and investment in services. ESF is a European private sector grouping that comprises major European service businesses and European service sector federations covering service sectors including financial services, telecommunications and IT services, maritime transport, business and professional services, distribution, postal and express delivery, audio-visual and education services, etc. When trying to invest in third countries, all these services sectors are, in a way or another, subject to specific regulation related to foreign direct investment (FDI).

1. Importance of FDI for international trade in services

The European Union is the biggest world investor (€11.5 Trillion Outward stocks in 2018 – 37.1% of global FDI) and recipient (€10.1 Trillion Inward stocks – 31.3% of global FDI[1]) of foreign direct investment, more that 60% of which is coming from services companies (outward FDI) and 85% going to services sectors (inward FDI)[2]. The European services enterprises are therefore regularly confronted to foreign direct investment's regulation in third countries where they want to invest or to expand their commercial presence abroad.

[1] UNCTAD World Investment Report 2019, *page 2016*

[2] Source: Eurostat (bop_fdi6_pos) - Extra-EU foreign direct investment positions, by economic activity, EU-28, 2014 - (% of all economic activities) – *See* here.

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We would like at this stage to highlight the links between FDI and employment. A significant number of jobs are created abroad through the foreign direct investments (subsidiaries and affiliates) made by European investors outside the EU. Although the detailed statistical data are missing, Eurostat figures show that foreign affiliates of EU companies employ 14 million workers outside the EU (Outward FATS), and nearly 8 million persons are employed in the EU-28 by foreign companies established in the EU (Inward FATS)[3]. A significant number of these workers are employed in services businesses, since as said here above, approximately 60% of all outward EU FDI Stocks are invested by services companies, and more than 85% of all inward EU FDI Stocks are invested in EU services sectors.

The sheer importance of these figures is clear evidence of the high interest that the European Services Forum gives to the discussions related to the investment facilitation for development.

2. Investment and the WTO

We understand that there are currently three main areas of work in the WTO on trade and investment:

- A Working Group established in 1996 conducts analytical work on the relationship between trade and investment.
- The Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), one of the Multilateral Agreements on Trade in Goods, prohibits trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of GATT 1994 (General Agreement on Tariffs and Trade). Such rules however do not apply to services sectors.
- The General Agreement on Trade in Services (GATS) addresses foreign investment in services as one of four modes of supply of services.

This latter is a well-known agreement to the services industry, who understand that the only way to trigger international trade in services via this third mode of supply ("commercial presence abroad") is indeed to initiate first a foreign direct investment of some sort, either through a new "green field" operation, or through a merger or acquisition of an existing company in the targeted host country, which will entail i) preferably a wholly owned subsidiary, or ii) a majority-controlled partnership with a local entity, or iii) a minority stake in a joint-venture enterprise, although this is always a scenario that is of less interest to services investors, and will not encourage transfer of know-how and expertise.

Unfortunately, there is not much for services companies on foreign direct investment in the WTO beyond the GATS commitments taken by WTO members during the Uruguay Round and the subsequent WTO accessions. ESF favoured the adoption of new rules on investment by the WTO, following the establishment of the Working Group on the Relationship between Trade and Investment that was established during the 1996 Ministerial Conference in Singapore to examine the relationship between trade and investment. ESF welcomed the adoption of the work programme in the declaration by the WTO Ministerial Conference in Doha in 2001, which stipulated: "Recognizing the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 21 *[of the Doha Ministerial Conference]*, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations". But the

[3] *Source:* DG Trade Statistical Guide *– June 2018 - Eurostat (fats_g1b_08).*

said "fifth Ministerial Conference" in Cancun in 2003 was unable to deliver any result and the said "Singapore issues", including trade and investment were rejected.

That is one of the reasons why the European Services Forum welcomed the Joint Ministerial Statement on Investment Facilitation for Development, adopted by trade Ministers from 70 countries at the WTO Ministerial Conference in December 2017 in Buenos Aires. This proponent group, encompassing participants from developed and developing countries, pledged for "beginning structured discussions with the aim of developing a multilateral framework on investment facilitation". So, finally, fourteen years after Cancun, trade and investment is back on the table of the WTO talks, but not gathering at this stage the whole membership.

In November 2019, in the aftermath of the informal Ministerial meeting organized by China in Shanghai, 98 WTO Members representing all levels of development and all geographic regions co-signed a follow-up Joint Ministerial Statement. Therein, they committed themselves to intensify the work to develop an investment facilitation framework and to work towards a concrete outcome on Investment Facilitation for Development at the Twelfth WTO Ministerial Conference (MC12).

The European service industries welcomes the strong activity in the exploratory phase where participating countries shared views in assessing how investment facilitation policies and measures can help countries foster development, diversify their export capacity, integrate into global value chains (GVCs) and link up to the digital economy. It has been appreciated that the process has been informed by views from the private sector concerning the ground-level obstacles when investing in various countries. The private sector input brought evidence that concrete policies, tools and best practices that governments can adopt to facilitate investment, such as improving regulatory transparency and predictability, streamlining and speeding up administrative procedures, and enhancing international cooperation, are all elements that a future investment facilitation framework should take into consideration.

Many countries have already tabled proposals in these "structured discussions" in the course of 2019, and one can only hope that more countries will join the talks. We understand that the negotiations have now started in Geneva with more than 100 countries participating to the drafting process based on a "streamlined text" build by a coordinator from the above-mentioned proposals.

3. The possible content of the Disciplines

The European Services Forum is following closely the discussions on the various issues that should be included in a future Investment Facilitation Framework. We would like first to draw the attention on the fact that there is a lot of similarities in this exercise and the one that many WTO members are running in parallel on the disciplines for domestic regulation in services. The services sectors are major investors, since the preferred way for services companies to reach international clients is through the so-called "Mode 3" of the General Agreement on Trade in Services (GATS), labelled "commercial presence abroad", which has to start by getting the authorisation to invest. ESF is therefore interested by these two initiatives as they have much in common. Hence, we have reiterated here some of our priorities expressed already in the context of the services domestic regulation's talks.

ESF would like to suggest a non-exhaustive and in-no-particular order list of provisions that should be included in such framework:

a) Provisions on transparency

- Transparent regulatory environment: all regulation (at all administrative levels) should be easily accessible and comprehensible, and since this exercise is notably destined to foreign businesses, translated at least into English.
- Publication: all regulation (at all administrative levels) should be made public.
- Enquiries: all businesses should have access to contact points, preferably through one-stop-shop, where they can enquire about the regulatory process for their sector, what is the authorisation procedure to set up an establishment in the host country, etc.
- Review and appeal: Should a business be not qualified to obtain the authorisation to start business in its area of interest, a proper mechanism should be available to ask for a review and an appeal.
- Notification to the WTO: Beyond the transparency of the national regulation relevant for foreign investors, the Participating countries shall also commit to notify these relevant regulations to the WTO Secretariat, as a show of good faith in implementing the new "Investment Facilitation Framework" and allow all the membership to take note of the said regulation. In this regard, ESF would like to propose an ambitious suggestion, calling for the use of a system of '*reversed burden of proof*', whereby WTO Members that have not notified certain measures bear the burden of proof, in potential dispute settlement contexts, to show that such measures comply with their obligations and commitments under WTO law (namely the GATS, applicable Plurilateral Framework Agreements, and the Investment Facilitation Framework).

b) Authorisation process

- Requirements for Applications and Examinations: The requirement and conditions set up by the regulatory authorities should be clear and updates should be made easily available;
- Setting of Fees: the fees to obtain the license or any other relevant authorisation to invest should be public, non-discriminatory, reasonable and be limited to cover the actual administrative costs for the activities of the national competent authority in managing the authorisation system.
- Processing of Applications: The processes of application should be as simple as possible to achieve the intended aim, and the least burdensome as possible. Authorities should accept electronic applications and accept duly recognized copies of original documents;
- Informing Applicants of Status of Applications: All Foreign investment board or authorities should have clear process in place for informing the foreign investor applicant of their status of application, and keeping them informed in good time, following a due diligence process.

c) Independence of the Investment authorities and fight against corruption

- The rules adopted in the Framework should require that the Investment Board or relevant national authorities in charge of analysing investment applications shall be separate from, and not accountable to, any domestic competitors that they regulate. The decisions of and the procedures used by investment authorities shall be impartial with respect to all market participants. These competent authorities shall adopt their decisions in an independent and impartial manner.
- The rules adopted in the Framework should also include measures to tackle bribery and corruption, ranging from the commitment by governments to ratify and implement international legal instruments such as the OECD Anti-Bribery Convention, and rules to

promote the adoption by the foreign direct investors the adoption of *voluntary* corporate social responsibility good practices, and to commit to fight against corruption.

4. The next steps

The European Services Forum calls on the largest number of WTO members to adopt the elements that will be included in a future "**Investment Facilitation Agreement" (IFA)** and to include them into their own national legislation governing foreign direct investment.

Beyond the adoption of rules in the national legislation of the participating WTO members, it will be of primary importance to include all these elements into a proper international investment facilitation agreement of some sort under the auspices of the World Trade Organisation. A "**WTO Committee on investment facilitation**" should be establish so as to monitor the implementation of this new agreement, notably by receiving the members notifications. Such a Committee should also be a place to manage the technical assistance and capacity building that might result from the adoption of the agreement, in a similar way that the Committee on Trade Facilitation is functioning in the Trade Facilitation Agreement (TFA) that was adopted at the 2013 Bali Ministerial Conference.

It will be important that the elements of the forthcoming Investment Facilitation Agreement will be adopted by the whole WTO Membership, and hence will be part of the multilateral rules. However, should this not be possible, due notably by the rejection of such framework by a certain number of WTO members, ESF urges the participating countries to move ahead on a plurilateral basis. ESF considers that the negotiations for an Investment Facilitation Framework do not reflect a configuration where possible "free riders" would benefit from such framework. On the contrary, the clear beneficiaries of such framework will be the countries which would have clear commitments in applying the elements that would be agreed in the Framework, that would provide conditions ripe for foreign direct investors to create growth and jobs on their markets. ESF therefore calls for the elements of the framework to be granted on a Most Favoured Nation (MFN) basis.

The momentum created by the Joint Ministerial Statement on Investment Facilitation for Development in the fringe of the 11th WTO Ministerial Conference should be preserved and transformed into a new set of rules, contributing to maintain the negotiating function of the World Trade Organisation.

Therefore, the European Services Forum calls upon WTO Members to engage in the coming months in the negotiating phase towards the adoption of WTO Investment Facilitation Framework if possible by the Twelfth WTO Ministerial Conference whenever it will take place after the COVID-19 crisis, or at least to register good progress at that Conference and encourage the negotiators to keep the momentum and pursue their talks towards the conclusion of an ambitious framework as early as possible.

List of ESF Members Supporting the above Position

- 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
- Business 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 – FBE
- European Community Shipowners' Associations – ECSA
- 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
- HSBC Group
- IBM Europe, Middle East & Africa
- Inmarsat
- Institute of Chartered Accountants in England and Wales - ICAEW
- Insurance Europe
- Irish Business and Employers' Confederation - IBEC
- Law Society of England & Wales
- Le Groupe La Poste
- Microsoft Corporation Europe
- Mouvement des entreprises de France – MEDEF
- Oracle Europe, Middle East & Africa
- Orange
- PostEurop
- Prudential Plc.
- Standard Chartered Bank
- Svenskt Näringsliv (Confederation of Swedish Enterprise)
- TechUK
- Telenor Group
- The CityUK
- UPS
- Vodafone
- Zurich Financial Services