



## EUROPEAN COMMISSION

Directorate-General for Trade

Directorate B - Services and Investment, Intellectual Property and Public Procurement  
**Investment**

Brussels, 14.09.2016  
Trade B2/WI/am 5778862

### MEETING FLASH REPORT

**Subject: Meeting with ESF on Performance Requirements - 14 July 2016**

#### Participants European Services Forum (ESF):

-Pascal Kerneis (PE), Managing Director, European Services Forum

- [redacted] Art. 4.1(b), Wind Europe

- [redacted] Art. 4.1(b), BDI

- [redacted] Art. 4.1(b), DIGITAL EUROPE

#### COM Participants:

[redacted] Art. 4.1(b) (B.2 DG TRADE), [redacted] Art. 4.1(b) (DG TRADE), [redacted] Art. 4.1(b) (DG GROW)

The meeting took place following an ESF letter (Ares(2016)2227873 - 12/05/2016, see attachment) addressed to DG Demarty.

COM [redacted] Art. 4.1(b) underlined the growing concern with respect to the amount of Performance Requirements including local content requirements across the world. Increasingly developing countries have started applying Performance Requirements (PR) on foreign investors and service suppliers although these measures are not an instrument conducive to attract investment but rather the contrary – PRs today do form a real impediment for FDI. By this, PRs are not the path to make foreign investment work for development. COM informed about the EU investment approach and how PR but also other impediments described in ESF's note (like forced joint ventures, Senior Management and Board of Directors provisions) are dealt with in comparison with other international partners and how EU addresses this problem in international for a as well as in EU Trade negotiations.

ESF (PK) asked why PRs could be challenged under ISDS in US investment agreements and not in EU agreements. COM replied that the EU proposed investment court system

(ICS) would not be applicable to PR because EU investment agreements cover investment protection provisions (like unfair compensation in case of expropriation, denial of capital transfer, fair and equitable treatment) and core disciplines like national treatment. ESF raised Senior Management and Board of Directors provisions abused by certain countries to effectively hinder the operation of an investment. The practice of "material impairment" used by an increasing number of countries was discussed and ESF indicated to provide examples for such impediments encountered outside the EU. As further impediments to foreign investment ESF mentioned foreign equity caps, local employment requirements and digital protectionism. Public Procurement in some non – EU countries was also identified by ESF as haven for unfair local content and other performance requirements. Art. 4.1(b) informed about recent ESF contacts as regards the WTO compatibility of such local content requirements and asked what could be done under WTO disciplines. COM Art. 4.1(b) provided information on the applicable WTO system in this respect, especially as regards TRIMS, GATS and GATT. PT raised issues with respect to wind energy in BRICs countries. PK reported about abusive requirements to force foreign business to carry out research and development in China and Turkey. PK also raised as impediment for foreign business certain requirements for license fees and imposed contract durations which Japan has taken up in its investment agreements as part of the Performance Requirements Article. DG TRADE and GROW commented to this respect taking note of the concern expressed by ESF.

ESF suggested at the end of meeting to provide COM with more examples on the detrimental effect of Performance Requirements to EU business.

Art. 4.1(b)

Cc.: J-L Demarty, R. Schlegelmilch, Art. 4.1(b). Art. 4.1(b) . Art. 4.1(b) , all B2 unit (DG TRADE), Art. 4.1(b) (DG GROW)