Questions and recommendations on the

European Commission's proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market

(1) The European Commission ("Commission") presented a draft Regulation on Foreign Subsidies Distorting the Internal Market ("Foreign Subsidy Instrument Proposal" or "FSI Proposal" or "FSI") aimed at implementing adequate control of third-country subsidies that have a distorting effect on competition in the European Union ("EU") internal market. Under the FSI Proposal, the Commission would be empowered to investigate subsidies granted by third-country public authorities to undertakings operating in the EU on the basis of (i) a general market investigation tool ("ex-officio-instrument") and (ii) two instruments intended for the examination of mergers and public procurement procedures.

(2) ICC has set up a global task force that includes, notably, members from several major Asian economies, the EU, the USA, and Latin America. ICC considers that State subsidies play an important role in the economy but have the potential to disrupt fair competition. ICC welcomes the idea that an economic block such as the EU regulates all State subsidies and not only, as it has been the case so far, some of them (*i.e.*, subsidies granted by its own Member States). However, the FSI Proposal raises many questions.

(3) First, the draft regulation has limitations. Some of them are of a procedural nature: the lack of articulations between the FSI regime and other comparable legal frameworks found in bilateral agreements or within the World Trade Organization ("WTO"); the lack of articulations between the FSI and the Foreign Direct Investment ("FDI") control regimes that exist in many countries; the unnecessary complexity arising from the difference between the notification thresholds found in the FSI and in the EU Merger Regulation ("EUMR") and from the mere obligation to file two different forms under these two regulations for the same transaction. Other

limitations relate to important substantive points, such as how the distorting effect (or the lack of it) of subsidies would be assessed. ICC offers suggestions to address not only these limitations but also others that are not mentioned in this summary.

(4) Second, many aspects of the FSI Proposal are not sufficiently precise, which would compromise legal certainty. ICC suggests that a more precise wording should be used in the final version of the regulation. However, in several instances, the explanations need to be more detailed, and the Commission should consider publishing supporting guidelines.

(5) Third, given that the private sector will have to self-assess the compliance of the subsidies, it seems unlikely that even a precise wording will suffice: ICC invites the Commission to provide practical examples against which private companies could compare their own situation.

A. General comments

(6) EU competition, State aid, and public procurement rules play a crucial role in ensuring fair competition in the internal market. However, none of these instruments apply to third-country subsidies that provide beneficiaries with unfair advantages, when such undertakings acquire companies located in the EU territory, participate in public procurement procedures or engage in other economic activities in the EU. While subsidies from Member States and their effect on competition in the EU are subject to strict EU State aid control and enforcement by the Commission, there is no comparable control for third-country subsidies granted to companies operating within the internal market (admittedly, there are State aid provisions in several bilateral agreements in specific sectors which provide for a control of third-country subsidies but they are in no way comparable in scope nor in terms of risks). Effective control mechanisms are therefore needed to protect competition in the internal market from distortions caused by third-country subsidies, and to guarantee a level playing field in the EU.

(7) Subsidies that distort markets and cause competitive advantages, which are merely based on third countries' public support and not on the quality and degree of innovation of a product or service, have a highly detrimental potential. Moreover, they can even have the power to force other companies out of the market.

(8) Distorting subsidies can take on various forms, e.g., zero-interest loans, unlimited State guarantees, tax exemptions or reductions in respect of foreign investments or trade, or dedicated State funding. In many cases, would they be granted by an EU Member State and assessed under EU State aid rules, they would be deemed

problematic. This jeopardises the general openness of the EU internal market to foreign investments. This openness may only work if all those operating in the internal market abide by the rules that apply in the EU or by a set of similar rules.

(9) ICC understands that the EU would like to introduce an effective and comparable control mechanism for third-country subsidies that would apply to undertakings operating in the EU internal market, in addition to the existing State aid and public procurement rules. However, there is still a need to provide undertakings within and outside the EU that are affected by the FSI with greater clarity and legal certainty, which creates some room for improvement of the FSI Proposal.

(10) While certain foreign subsidies may have distorting effects within the EU internal market, others may not. Indeed, the traditional EU State aid regime recognises that many aids granted by Member States are "compatible" with the Treaty, and hence harmless; obviously, the same can be said of non-EU subsidies. Therefore, ICC respectfully suggests that the FSI should further clarify (i) the scope of the calculation of the amount of subsidies and (ii) how the competition impact assessment should be conducted.

(11) It is key to preserve the EU's fundamental openness to foreign and domestic investments while keeping the bureaucratic hurdles for mergers & acquisitions and public procurement activities as low and streamlined as possible. To prevent unnecessary burdens on business and excessive "blocking/freezing" periods for undertakings, the monitoring procedures introduced by the FSI Proposal must be clear, predictable and unbureaucratic.

(12) ICC respectfully proposes below recommendations in response to a number of specific issues.

B. Specific comments

(13) To ensure a right balance between the Commission's objectives and an efficient implementation of the FSI, attention must be paid to several elements. Some mechanisms of the FSI Proposal should in our view be adjusted.

- **Commission's sole jurisdiction**

(14) To achieve a coherent application of the different instruments and to avoid parallel legal assessments of the same facts in detriment of the uniform application of EU law, the Commission should be exclusively responsible for all instruments, as proposed in the FSI Proposal. However, depending on the circumstances of individual cases, Member States' national authorities should be able to be consulted

by the Commission, in the same way as it currently works for State aid. In particular, considering that a Member State could have jurisdiction to review a specific project under its own FDI rules, a conflict could arise between the FSI and national FDI regimes. Therefore, a sound coordination mechanism should be introduced to tackle such conflict.

- **Subject scope (Chapter 1, Article 1)**

(15) ICC notices that, in a State aid investigation, the Commission has a very clear target to look at. Also in a countervailing duty investigation, the Commission must indicate the scope of the subsidies it considers problematic, and it must demonstrate that the said subsidies are related to goods exported to the EU. However, under the FSI Proposal, undertakings are required to carry out a full review of, and to report to the Commission, all the financial contributions they might have received, regardless of whether they are directly or indirectly related to their activities in the EU. In many circumstances, it will be extremely difficult for companies to identify all such financial contributions.

- **Existence of a third country subsidy (Chapter 1, Article 2)**

Definition of a subsidy

(16) The proposed definition of a third-country subsidy is similar to, but not identical to, the concept of State aid under current EU competition rules. The concept of "third-country subsidy" and any similarities or differences with the relevant definitions under EU State aid law should be further clarified to ensure greater legal certainty. For instance, the criterion of "imputable to the State" in the subsidy determination rules of the *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union* ("**State Aid Notice**") is to consider "the granting of an advantage directly or indirectly through State resources and the imputability of such a measure to the State", which is not stipulated in the FSI Proposal.

(17) So far, what will fall under the term "financial contribution" of a third country to be reported by undertakings is unclear. Without clear guidance, the reporting obligations could become very extensive for every undertaking operating within and outside the EU. Therefore, the term "financial contribution" should be clarified. ICC would like to see it clarified that not every inflow of money that an undertaking receives from a third country, for example in the case of remuneration for the performance of a public contract, would be classified as a financial contribution and as a benefit within the meaning of the FSI Proposal.

(18) ICC respectfully suggests that the Commission issue guidelines, which should list as many (positive and negative) examples as possible of financial contributions. These guidelines could also further explain how the Commission will calculate the benefit of each type of subsidy, e.g., what the basis of comparison is, how the market operator test is used (normally used in State aid cases) and where third-country prices are used (normally applied in anti-subsidy investigations). ICC notes that there is a *Guideline for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations* under EU's existing anti-subsidy rules, which elaborates on the calculation method for different types of financial contributions.

(19) ICC notes that the Commission should consider how a company could assess and determine whether it has received financial contributions in the context of the FSI Proposal. There should be a mechanism to increase legal certainty for companies intending to acquire or bid in a procurement procedure that could exceed the specific thresholds. In addition, pre-notification discussions should be possible to be advised as to whether the notification thresholds are triggered.

(20) In the event where an international group (be it Japanese, Indian or from the US) has a subsidiary that operates in the EU on a fully functional basis, and if the same group has another subsidiary in a third country, the latter having contracts (e.g., utilities management) with the government of that third country, it remains to be seen whether and how the EU subsidiary could benefit from the third country government's financial contribution to its sister undertaking in a third country.

(21) ICC considers that the definition of foreign subsidies needs greater clarity and that detailed draft guidelines should be urgently prepared and published.

Definition of foreign public entities

(22) It is also unclear what entities fall under the term "foreign public entities." Although Article 2(2)(b)(ii) provides that they are entities "whose actions can be attributed to the third country, taking into account elements such as the characteristics of the entity, the legal and economic environment prevailing in the State in which the entity operates including the government's role in the economy", it is not obvious how these features are taken into consideration in practice. This ambiguity is problematic, because it would impair the predictability for foreign companies as to whether loans, investments, goods or services provided to them by state banks or government-invested firms should be regarded as financial contributions under the FSI Proposal.

(23) ICC therefore considers that the FSI should elaborate in more detail on the definition of foreign public entities. Alternatively, a draft guidance providing more details on which criteria to define such public entities will be taken into account, and how such criteria will be assessed, should be urgently prepared and published.

- **Distortions on the internal market (Chapter 1, Article 3)**

(1) Assessment indicators

(24) The FSI Proposal sets out several indicators for determining whether there is a distortion of competition within the internal market, *i.e.*, the amount of the subsidy, the nature of the subsidy, the situation of the undertaking and the markets concerned, the level of economic activity of the undertaking concerned on the internal market and the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.

(25) However, these indicators are vague and ambiguous. For instance, the difference between the "nature of the subsidy" and "purpose of the subsidy" is not quite clear, and the concepts of "situation of the undertaking" and "level of economic activity of the undertaking" can overlap. Therefore, further clarification of these indicators should be required. Future guidelines should in particular provide concrete examples, in order to help companies to interpret those indicators.

(2) Minimum threshold

(26) Although the FSI Proposal provides that "a foreign subsidy is unlikely to distort the internal market if its total amount is below €5 million over any consecutive period of three fiscal years", it is unclear whether "a foreign subsidy" in this context means a foreign subsidy regime (grants or loans) possibly granted to several recipients or a specific subsidy received by one recipient. Further clarification should be pondered.

- **Balancing test (Chapter 1, Article 5)**

(27) If the Commission finds that there is a distortive third-country subsidy, it will balance the negative effects of this subsidy with possible positive effects on the development of the economic activity in question before accepting commitments or imposing remedial measures. Further criteria for the balancing test or concrete reasons for justifying a distortion of competition are not mentioned in Article 5 and should be detailed. So far, the balancing test is unspecific and grants the Commission excessive discretion in weighing any negative and positive effects of a

third-country subsidy. It would be useful to publish guidelines that could help the companies to self-assess their situation and that would also, as guidelines normally do, be binding upon the Commission (reducing thus its discretion). Another way to reduce the uncertainty resulting from this discretion would be to publish block exemption regulations in order to provide safe-harbours for categories of subsidies that are at the same time frequent and harmless, as it is the case in the current State aid regime.

(28) In addition, under the impact of the COVID-19 and the lockdown policy, many national and local governments have offered relief or subsidies to help undertakings overcome difficulties, which can be exempted under EU State aid rules. However, the current FSI Proposal does not provide for any exceptional provisions for government relief or subsidies to be granted in special periods during such economic hardship. This can thus create unfair obstacles to very useful and beneficial investments into the EU made by foreign undertakings. Hence, the criteria for the balancing test should be provided for in the FSI Proposal and should contain concrete rules that would allow justification of the foreign subsidy.

- **Commitments and redressive measures (Chapter 1, Article 6)**

(29) It is important that remedies are both effective and proportionate. This particularly concerns an interest-bearing repayment of the subsidy by the undertaking to the third country (Article 6(3)(h)), as also provided for in EU State aid law, to the extent this could reverse the distortion of competition. To this respect, a clarification or article 6(6) would also be useful.

(30) Currently, we do not see how the publication of results from research and development can be an appropriate redressive measure since this will often involve business and trade secrets.

(31) Structural remedies, such as a divestment of assets, should be clearly acknowledged as "ultima ratio" measures.

- **General market investigation tool (Chapter 2)**

(1) No re-investigation after decisions under instruments 2 and 3

(32) When cases have already been investigated under the specific instruments in the context of mergers (Chapter 3) and public procurement (Chapter 4), they should not fall again within the scope of the general market investigation instrument for reasons of legal certainty and the protection of legitimate expectations.

(33) If the general market instrument is used in merger cases below the thresholds of the merger instrument, this should only be possible in exceptional cases and require a special justification. ICC respectfully suggests that such conditions be set out in more detail in separate guidelines.

(34) The Commission should also take into account that subsidies can also be investigated under the WTO countervailing duty investigation regime. Double investigation of the same subsidies should be avoided for cost reasons but moreover also to ensure consistency.

(2) Unbureaucratic and legally secure procedures

(35) Generally, the procedures under the individual instruments should be clear, predictable and unbureaucratic, to prevent unnecessary burdens on business and excessive blocking periods for undertakings. The investigation procedures (Articles 8 and 9) should be as unbureaucratic and expedite as possible. This includes clear assessment criteria that enable predictability of decisions. In contrast to the second and third instrument, the general market investigation instrument does not foresee concrete time limits for the procedure, neither for the preliminary examination nor for the in-depth investigation. For reasons of legal certainty, the Commission should establish a time limit regime with the opening of the investigation, which aims at an efficient conduct of the procedure.

(36) Furthermore, in Article 10, the FSI Proposal states that the Commission may impose interim measures if there are indications that a foreign subsidy exists and distorts, or has a serious risk of distorting, competition within the EU internal market. The scope of such measures should be further clarified. Indeed, it is very unclear (i) which indications shall be taken into consideration, (ii) to what extent it constitutes a serious risk of distorting competition, and (iii) which interim measures can be imposed by the Commission.

- **Instrument for the assessment of concentrations – (Chapter 3)**

(37) Chapter 3 of the FSI Proposal provides for mandatory pre-notification and *ex ante* review of mergers and acquisitions in cases where a third country grants a financial contribution amounting to at least €50 million and the EU turnover of one of the European undertakings involved is €500 million or more.

(1) Consistency with EU merger control mechanism

(38) ICC welcomes that the FSI Proposal, in Article 18 in conjunction with Article 20, covers the same type of transactions (*i.e.*, mergers involving a lasting acquisition of

control) that are reportable under EUMR. ICC also welcomes that the procedural rules and deadlines are mainly in line with those of the EUMR. Where possible, the FSI and merger control procedures to be examined in parallel should be linked to avoid (i) any duplication of efforts, (ii) waste of resources and, most importantly, (iii) potentially inconsistent results.

(2) Coherence with other regulations

(39) Consistency should also be established with regard to investment protection under the FDI Screening Regulation and international bilateral or multilateral treaties. The EU's fundamental openness to investment must not be jeopardised.

(3) No ad hoc notification of non-notifiable mergers?

(40) It seems at least questionable whether the *ad hoc* review under Article 19(5), according to which the Commission may require prior notification of a concentration even if it is not a notifiable concentration within the meaning of Article 18, would not lead to intolerable legal uncertainty for mergers and acquisitions or even joint ventures, as the concentration would not be allowed to proceed even for non-notifiable concentrations subject to Article 23(1).

- **Instrument for the examination of tenders in public procurement procedures (Chapter 4)**

(41) The third instrument is a notification-based instrument for the scrutiny of bids for public contracts by undertakings that receive a financial contribution from a third country (same thresholds as referred to in Chapter 3) if the estimated value of the public contract is at least €250 million. The aim is to detect foreign subsidies that enable a bidding undertaking to submit a bid that is "unduly advantageous" (Article 26). The notification obligation applies not only to an individual bidder, but also to groups of economic operators, main subcontractors and main suppliers.

(1) Scope of the instrument

(42) Since the FSI Proposal is without prejudice to Regulation 2016/1037 on the protection against subsidised imports and the WTO Agreement on Subsidies and Countervailing Measures, it is unclear how the FSI will apply to public procurement contracts referring to goods and goods and services in a combined contract. If such contracts were to fall outside the scope of the FSI Proposal, the scope of the Public Procurement Instrument would be limited to a considerable degree. The Commission should better explain the interplay between the two sets of legislations and clarify the scope of the FSI.

(2) Prior notification of foreign financial contributions

(43) Since Article 28(2) includes an explicit reference to Directive 2014/25/EU – among the directives in respect of which operators are obliged to notify foreign financial contributions – and since this Directive provides in Article 77 for the possibility of using qualification systems, an explicit reference to the possibility for economic operators to make prior notification of foreign financial contributions to contracting authorities already using qualification systems pursuant to Article 77 of Directive 2014/25/EU is highly suggested. This clarification would not only provide greater legal certainty and an efficient streamlining of the procurement procedure, but it would also align with Directive 2014/25/EU. Furthermore, it is worth pointing out that in some essential and strategic sectors, resilience is of paramount importance and some contracting authorities do need specific suppliers. Including the possibility to select undertakings on the basis of foreign subsidy declarations at a qualification stage is crucial to (i) optimise time, (ii) guarantee a fair and fast execution of tenders, and (iii) exclude the risk of litigation while still delivering the Regulation's competition objectives.

(3) Notion of notifiable main subcontractors and main suppliers

(44) According to Article 28(2), the obligation to notify foreign contributions in advance also applies to the most important subcontractors and suppliers; a subcontractor or supplier is considered main (i) if its participation ensures essential elements of the performance of the contract or (ii) if the economic share of its contribution exceeds 30% of the estimated value of the contract. Since the first criterion seems unclear and may lead to legal uncertainties, the Commission should either clarify its application or only the second criterion should be relevant for determining the importance of the subcontractor or supplier.

(4) Responsibility of the lead economic operator?

(45) When declaring the subsidies that were received in the past three years by its main subcontractors and suppliers, the lead economic operator should not be held liable for the provision of incorrect or incomplete information by such subcontractors and suppliers.

(46) This would place the liability risk disproportionately on one institution. It should thus be clarified that the lead economic operator cannot be held liable in these cases, nor can they "ensure" notification. The lead economic operator can only attempt to collect information without guaranteeing its correctness and completeness.

(5) Time limits for examination

(47) The FSI Proposal also foresees that from the receipt of the notification, the Commission has 60 days for preliminary examinations and 200 days for the in-depth investigations (Article 29). Said terms are not in line with the time frame of procurement procedures and should be shortened. An excessively long assessment by the Commission would cause serious delays to the detriment of commercial activities of prime necessity for the society and for the pursuit of European policy objectives. The 200-day deadline within which the Commission would complete the in-depth investigation would place a burden not only on companies receiving subsidies but also on contracting authorities, with the consequence that many essential services would be slowed down at a critical time when EU contracting authorities could benefit from funds from the Recovery and Resilience Facility with tight timeframe. A more expeditious procedure would limit uncertainty for businesses, guarantee the continuity of essential services pursuing EU objectives and ensure a more efficient execution of the tenders.

(48) ICC respectfully recommends the final regulation to reduce the 200-day term for adopting a decision closing the in-depth investigation. Reasonable time limits for examination might be 30 days to complete the preliminary investigation and 90 days to complete the in-depth investigation.

- **Interplay between procedures (Chapter 5, Article 33)**

(49) To further reduce the bureaucratic burdens on undertakings, one could argue for further consistency with EU Merger Control regarding aligning notification requirements since many mergers will have to go through both procedures. ICC recommends that the filing procedures be aligned with the existing merger control review framework to the maximum extent possible. In particular, we suggest that the two notification forms be if not merged at least articulated and that they could be lodged together and treated in a coherent way by the case teams.

(50) This would avoid duplicating similar administrative settings and save costs. It would also be helpful for undertakings to manage compliance costs and avoid confronting multiple investigation proceedings and providing repetitive information.

(51) With such a combined procedure, the Commission would limit its investigation of acquisitions facilitated by foreign subsidies within the procedural scope of its competition review.

(52) Taking a step back, even if repetitive assessment is inevitable, it should not be an endless, uncertain task for undertakings. Article 33(1) states that a subsidy notified in

the context of a concentration under Article 19 may be relevant and reassessed in relation to another economic activity. It should be clarified that this means "only" in relation to another economic activity.

- **Market investigation (Chapter 5, Article 34)**

(53) Article 34 does not clearly set out the conditions under which the Commission may initiate a market investigation into a particular sector. It merely states that the Commission may conduct a market investigation, where any information from any source about a suspected distorting foreign subsidy can substantiate a reasonable suspicion of the possible existence of a foreign subsidy. It may also request a Member State or third country concerned to supply information. The prerequisites are not very specific and could be considered too broad, especially taking into consideration the already broad concept of foreign subsidies as laid down in the FSI Proposal.

- **Limitation periods (Chapter 5, Article 35)**

(54) The powers of the Commission under Article 9 (In-depth investigation) are subject to a limitation period of ten years from the grant of the foreign subsidy.

(55) In addition, Article 35 states that "[a]fter each interruption, the limitation period shall start to run afresh". However, even though the limitation period may run afresh after interruptions, there should also be an expiration of the period. For instance, under Article 26 of Regulation (EC) No 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, "each interruption shall start time running afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment". Having a certain maximum limit on the limitation period is crucial for undertakings to operate under a stable condition.

- **Content requirements for publication of decisions (Chapter 5, Article 36)**

(56) To enhance transparency, in addition to protecting the related business secrets and other confidential information, the publication of decisions should contain important circumstances, facts, reasons, basis, results and conclusions. This is a capital question that will ensure predictability and help company to self-assess their situation.

- **Addressees of decisions (Chapter 5, Article 37)**

(57) Decisions under the FSI shall be addressed to the undertakings (or associations of undertakings) concerned. It is unclear what role foreign governments will play during the investigation and whether they will have any right to challenge a decision made by the Commission. This is clearly different from the EU State aid regime, where an EU Member State needs to notify aid, is a party to the investigation and has standing to challenge any Commission State aid decision.

- **Administrative reconsideration and administrative litigation (Chapter 5, Article 37)**

(58) Considering that there are situations in which the undertakings or the association of undertakings concerned are dissatisfied with the decisions made by the committee, administrative reconsideration and litigation procedures should be added to provide opportunities to re-examine or judicially review the legality of the committee's decisions, and ultimately reduce the possibility that the illegal decision infringes on the legitimate rights and interests of relevant entities.

(59) This is of course a capital requirement, both for democratic and efficiency reasons.

- **Professional secrecy (Chapter 5, Article 39)**

(60) Article 39 states that the acquired information shall be used only for the purpose for which it was acquired (*i.e.,* notification for a concentration transaction or public tender procedure). However, this requirement appears to contradict the requirement under Article 33 that the possibility of subjecting a financial contribution notified in the context of one tool to be reassessed and targeted by other tools. Hence, these articles should be reconciled.

- **Relationship to other instruments (Chapter 6, Article 40 para.7)**

Limited scope of application due to primacy of WTO law

(61) It is important that the scope of application of the regulation is clearly defined from the outset. According to Article 40(7), the FSI shall not result in any action being taken which would amount to a specific action against a subsidy within the meaning of Article 32.1 of the WTO SCM Agreement. It is unclear whether this is meant to dramatically reduce the scope of the regulation. It is essential to clarify whether, and if so, limit the extent to which, this priority may exclude the application of the FSI to the supply of goods in fulfilment of public contracts and what the

situation is in the case of contract awards that include both services and the supply of goods.

(62) ICC stresses that it should be clearly stated in the FSI which areas will definitely be excluded.

- **Transitional provisions (Chapter 6, Article 47)**

Retroactive application

(63) ICC respectfully submits that the retrospective force of *ex post* investigations under Article 47 is excessively broad and contradictory. The FSI would give the Commission the power to initiate an *ex-post* review of foreign subsidies that may have distorted the EU market within the last ten years, by providing in Article 47 that: "[t]his Regulation shall apply to foreign subsidies granted in the ten years prior to the date of application of this Regulation where such foreign subsidies distort the internal market after the start of application of this Regulation." According to Article 47(3), the FSI Proposal does not apply to mergers and tenders already concluded before the entry into force of the Regulation. According to paragraph 1, the Commission should nevertheless be able to initiate an *ex officio* investigation of mergers and tenders if they are affected by foreign subsidies granted in the ten years prior to the entry into force of the Regulation and still distort the internal market after its entry into force. At first sight, this seems contradictory with the legal certainty goal pursued by Article 47(3). The circumstances under which a retroactive application of the instrument would be possible should be clarified.

(64) ICC respectfully suggests that the time limit for retrospective force should be shortened (e.g., to the same three calendar years as for *ex-ante* investigations) or that the condition for initiating recourse to *ex-post* investigations be limited to "third party complaints" with merit.

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