



Mr Olivier Guersent

Director General

Directorate General for Financial Stability, Financial
Services and Capital Markets Union

European Commission

1049 Brussels

BELGIUM

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Dear Director General,

I am writing to you regarding the issue of the intra-EU Bilateral Investment Treaties (BITs), in particular the adoption of an investment protection mechanism to replace the existing one, after these agreements are terminated. BUSINESSEUROPE has been in close contact with the relevant services of the European Commission since 2009, after the entering into force of the Lisbon Treaty which gave full competence to the EU on the policy for Foreign Direct Investment (FDI).

In view of the possibility that intra-EU BITs might not be compliant with the Single Market, I will not enter the debate over the termination of these Agreements, but rather express our view that these Agreements should remain in place until a strong and appropriate investment protection mechanism is found to replace the existing one. This is particularly important in times when investments within the EU are crucial to increase employment, competitiveness and innovation. The termination of existing intra-EU BITs and the entering into force of a new investment protection mechanism should therefore take place in a coordinated and harmonised manner, allowing for a smooth transition period and avoiding any legal gaps and uncertainties that would reduce the level of investment protection.

Turning to the issue of investment protection as such, creating a mechanism that maintains a high-level of protection of investors within the EU is important for both substantive and procedural reasons. On the substantive aspects, although the framework of the Single Market offers legal basis for the protection of investments, these provisions are not as clear and precise as in BITs, they are codified differently and they are not part of a unique legal framework.

Furthermore, in the absence of a clear and unique framework at European level (that includes a neutral dispute settlement mechanism), EU Member States tend to interpret and implement provisions on investment protection in different ways, offering investors different levels of protection. This results in a non-harmonised and sometimes even discriminatory treatment of investors within the EU, generating legal uncertainties and



hindering the development of the internal market. This is also confirmed in reports by the European Commission which show that the judicial systems of some EU Member States continue to face problems of independence and reliability. In our view, this is an additional reason why a mechanism to protect intra-EU investments is required.

Concerning the procedural aspects, in our recent exchanges with the European Commission we understood that mediation is being discussed as a possible solution at European level, to replace the investor-to-state dispute settlement (ISDS) mechanism currently included in the intra-EU BITs. Although mediation has merits and can offer a useful platform of communication and understanding between disputing parties, it is a voluntary procedure that requires good will of the parties. Therefore, the enforceability of an agreement reached by the Parties under mediation is also a challenge that disputing parties may face. Moreover, mediation may not be a suitable solution for certain types of disputes, for instance cases that risk to be politicised.

For these reasons, we believe that mediation should be an option for the disputing parties, for instance alongside amicable dispute resolution, but not the only option. It is of paramount importance that a more consolidated dispute settlement mechanism is provided. As the debate on the investment protection instruments that the EU will use in its international agreements informs the debate on the intra-EU BITs, we would like to further exchange with the European Commission on different possibilities, including a Court solution. The European business community would look for the following elements in such a mechanism: **efficiency**, in time and costs, **effectiveness** in the conduct of the dispute settlement procedure and the implementation/enforcement of the decision/award, **impartiality**, as an essential aspect of dispute settlement proceedings in the field of investments and **transparency**, in a manner that allows the protection of sensitive commercial interests.

Last but not least, I would like to refer specifically to the Energy Charter Treaty and the questions raised by the European Commission regarding the compatibility of the ISDS mechanism included in this Treaty with the Single Market. The Energy Charter Treaty is an international agreement in which both the EU and its Member States are members. In our view, dispute settlement provisions of the Energy Charter Treaty are in line with the principles of the Single Market and provide for an EU-wide harmonised approach to investment protection. We are particularly concerned by the possibility of the EU and its Member States withdrawing from the dispute settlement part of the Energy Charter Treaty. Our position is that this will put in question the implementation of all international agreements in the EU, which is automatic. Therefore, we believe that the Energy Charter Treaty should be treated in a different manner than the intra-EU BITs.



It is our understanding that a public consultation and an impact assessment on a possible replacement mechanism for the settlement of disputes between investors and States within the EU will soon be launched. BUSINESSEUROPE is ready to constructively contribute in this process and provide detailed responses on both the substantive and the procedural elements for the protection of investors within the EU.

I thank you for your attention, dear Director General, and look forward to your response. I would be happy to soon have the opportunity to further discuss this issue.

Yours sincerely,

Condoléenne

Markus J. Beyrer

Note: Due to the linkages of the issue of intra-EU BITs, their investor-to-state dispute settlement mechanism in particular, with the current debate on the framework of the EU (international) investment policy as well as its overall implications for the European industry, this letter has been also shared with the Directorate General for Trade, the Directorate General for Internal Market, Industry Entrepreneurship and SMEs and the Director General for Energy.

Cc.:

- *Mr Jean Luc Demarty, Director General, Directorate General for Trade, European Commission*
- *Ms Lowri Evans, Director General, Directorate General for Internal Market, Industry Entrepreneurship and SMEs, European Commission*
- *Mr Dominique Ristori, Director General for Energy, European Commission*